> without that person or entity's prior expressed invitation or permission.

App. 85a. In its prayer for relief, the plaintiff requests entry of judgment against Resource for its alleged violations of the TCPA and an award to plaintiff and the proposed class members for actual monetary loss or the sum of $500 in damages for each unsolicited facsimile sent by Resource, whichever is greater. App. 88a.

Because the TCPA is, in effect, a strict liability statute, the Indiana Complaint's allegations, if proven, would trigger liability for Resource even if Resource sent faxes to persons under the mistaken belief that such persons had solicited them. In addition, the language of the TCPA itself and its legislative history both explicitly state that the TCPA was passed to protect privacy interests.

Thus, the Indiana Complaint makes two facts clear – (i) the loss of use of paper and fax machines by plaintiffs in the Underlying Litigation is actionable even if Resource intended to send faxes only to those persons who had requested them and unintentionally (i.e., accidentally) sent them to persons such as plaintiffs who had not requested them; and (ii) the claims of violations of the TCPA are equivalent to claims of invasions of the plaintiffs' privacy.

Because the Policies provide coverage both for "property damage," including loss of use of property such as paper and fax toner, and "advertising injury," including invasions of privacy, Resource demanded that St. Paul defend it in the Underlying Litigation. St. Paul

refused to do so, and Resource filed suit in the Eastern District of Virginia, which is where the Policies were issued by St. Paul to Resource.

The district court concluded that St. Paul was obligated to defend Resource under the advertising injury provisions of its Policies, although it also concluded that the property damage provisions did not apply to the claims made in the Indiana Complaint. The district court then certified its order (which related solely to the duty to defend issues raised in the case, and not to the duty to indemnify issues) as a final disposition pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. On appeal, the Fourth Circuit reversed the district court's ruling on the advertising injury provisions and affirmed its ruling on the property damage provisions, holding that St. Paul was not obligated to defend Resource in the Underlying Litigation.

Of course, central to the decision both before the district court and the Fourth Circuit was the language of the Policies. The property damage provisions of the Policies provided for coverage as follows:

> **Bodily injury and property damage liability.** We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury or property damage that:
>
> - happens while this agreement is in effect; and
> - is caused by an event.
>
> ...

Property damage means:

- physical damage to tangible property of others, including all resulting loss of use of that property; or
- loss of use of tangible property of others that isn't physically damaged.

...

Event means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

App. 99a – 100a. The advertising injury provisions of the Policies provided for coverage as follows:

Advertising injury liability. We'll pay amounts any protected person is legally required to pay as damages for covered advertising injury that:

- results from the advertising of your products, work, or completed work; and
- is caused by an advertising injury offense committed while this agreement is in effect.

Advertising injury means injury, other than bodily injury or personal injury, that's caused by an advertising injury offense.

Advertising injury offense means any of the following offenses:

- libel or slander.
- making known to any person or organization written or spoken material that disparages the products, work, or completed work of others.
- making known to any person or organization written or spoken material that violates a person's right of privacy.
- unauthorized use of any advertising idea, material, slogan, style, or title of others in your advertising.

...

Advertising means attracting the attention of others by any means for the purpose of seeking customers or increasing sales or business.

App. 101a – 102a. In its opinion the Fourth Circuit focused on two primary issues: (i) was Resource's alleged act of sending the faxes to the plaintiffs in the Indiana Complaint (the alleged cause of any property damage) an "accident," thus triggering coverage under the property damage provisions of the Policies, and (ii) was the TCPA intended to protect the same "privacy" interests that are covered by the advertising injury provisions of the Policies. After considering these questions, the Fourth Circuit held that St. Paul is not obligated to defend Resource in the Underlying Litigation under either set of provisions.

In reaching its decision on the property damage coverage under the Policies, however, the Fourth Circuit improperly exalted federal procedural rules

over Virginia substantive law applicable to this diversity action. Specifically, the Fourth Circuit held that, pursuant to Rule 56, Resource was obligated to respond to St. Paul's motion for summary judgment on the property damage issue by introducing "facts" relating to Resource's intent or lack thereof to send faxes to persons who had not requested them – notwithstanding clear Virginia substantive law which holds that, in an insurance coverage case involving the duty to defend, a court may not look at any evidence other than the allegations of the complaint in the underlying litigation.

In rendering its flawed ruling on this issue, the Fourth Circuit observed that, "a party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but ... *must set forth specific facts* showing that there is a genuine issue for trial." App. 14a, 407 F.3d at 638-39 (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986)) (emphasis in original). It then stated that, "while Resource disputes the foreseeability of its consequences [from sending fax advertisements], this dispute is not a genuine one *under the summary judgment standards* ...." App. 14a, 407 F.3d at 639 (emphasis added). And again, in the next sentence, the Fourth Circuit stated that, "[b]ecause Resource ... fails to present evidence that could reasonably be mistaken as express permission to send these faxes, we can only conclude that the sending was not accidental." *Id.* The court concluded its opinion by further emphasizing this point, stating that, "Resource presented us with no evidence that it sent its faxes accidentally. It thus *cannot avoid summary judgment* on the point that the 'property damage'

provision provides no coverage for the class-action lawsuit." App. 20a, 407 F.3d at 642 (emphasis added). Significant to this petition, the Fourth Circuit, purportedly using the procedural guidelines of Rule 56, arrived at this conclusion in the face of Virginia substantive law holding that the court's analysis at the duty to defend stage (which was the posture of the case before the Fourth Circuit) must be guided **exclusively** by reference to the allegations in the complaint in the underlying litigation. Thus, the Fourth Circuit improperly trumped Virginia's substantive law by reliance on federal procedural rules (in a circumstance where the federal procedural rule did not require such a conflict with state substantive law and only existed because the Fourth Circuit improperly expanded the scope of Rule 56 beyond the boundaries set by *Erie* and its progeny).

Moreover, even if the Fourth Circuit had not misapplied a federal procedural rule to end run Virginia's substantive law, this Court nonetheless should grant review because of the Fourth Circuit's clearly erroneous departure from established Virginia law regarding rules of analysis in insurance coverage cases – specifically the well-established rule that duty to defend decisions must be made **solely** by reference to the underlying complaint and not by reference to other outside evidence. Only by ignoring this well-established rule (and substituting Rule 56 requirements in its place) was the Fourth Circuit able to deny coverage to Resource under the property damage provisions of the Policies. This error was so significant that it constitutes "plain error," and was "clearly wrong," "clearly erroneous" and "unreasonable," thus requiring this Court's review. *See Brockett v. Spokane*

Arcades, Inc., 472 U.S. 491, 500 fn. 9, 105 S.Ct. 2794 (1985) (noting deference to lower courts on state-law issues unless there is "plain error," the view of the lower court is "clearly wrong," or the construction is "clearly erroneous" or "unreasonable").

The Fourth Circuit's reasoning with regard to the advertising injury issues was, in different respects, as flawed as that applied to the property damage issue. First, the Fourth Circuit joined the Seventh Circuit – and departed from a federal district court decision affirmed by the Fifth Circuit – and held that the privacy interests protected by the TCPA, a federal statute passed by Congress to help remedy advertising abuses, only constitute a limited subspecies of the privacy interests that are afforded under modern jurisprudence. Specifically, the Fourth Circuit divided up the entire realm of privacy interests into two distinct principal strands – "secrecy" and "seclusion." App. 16a -17a, 407 F.3d at 640. It then stated that, "if the class-action complaint [alleging violations of the TCPA] alleges any violation of privacy, it is 'seclusion' privacy." App. 17a, 407 F.3d at 641. Later in its decision the court observed that, "we see quite easily how the TCPA might facilitate interstate commerce by allowing owners of fax machines sufficient *seclusion* to do with their fax-dedicated phone line and fax machine as they wished without sifting through stacks of unwanted faxes that deplete their paper and toner." App. 19a, 407 F.3d at 642 (emphasis in original). By limiting the scope of the TCPA's protections in this manner, the Fourth Circuit was able arbitrarily to remove the TCPA from the umbrella of privacy interests covered by the advertising injury provisions

of the Policies (which the Fourth Circuit also arbitrarily limited).

This limitation of the scope of the TCPA is certain to become an issue in future TCPA litigation occurring outside the insurance coverage context. Thus, it is critical that this Court ensure that the TCPA is properly interpreted to ensure that Congress' intent to provide consumers a remedy for advertising abuses is not subverted.[1]

For all of these reasons, the Court should grant the writ of certiorari and reverse the decision of the United States Court of Appeals for the Fourth Circuit.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit Erred By Applying Rule 56 to Trump Virginia Substantive Law

This Court should grant the writ of certiorari to answer definitively the question of whether the procedural standards of Rule 56 may be expanded to trump state substantive law in diversity cases. This Court has not given further comprehensive review to the appropriate scope and application of summary judgment standards since its trilogy of Rule 56 rulings in 1986. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986);

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[1] In fact, amici in the Fourth Circuit pointed to interpretations of the TCPA in the First Amendment context to augment their arguments in this coverage case. Thus, it is likely, if not certain, that interpretations of the TCPA made by federal courts in the coverage context will likewise be used by future litigants in TCPA litigation outside the coverage context.

Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). Moreover, the Court does not appear to have ever addressed the intersection of Rule 56 and the *Erie* doctrine, even though it has had the opportunity to review the proper application of *Erie* to other Federal Rules of Civil Procedure. *See, e.g., Semtek International, Inc. v. Lockheed Martin Inc.*, 531 U.S. 497, 121 S.Ct. 1021 (2001) (addressing intersection of *Erie* doctrine and Rule 41); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 100 S.Ct. 1978 (1980) (addressing intersection of *Erie* doctrine and Rule 3); *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136 (1965) (addressing intersection of *Erie* doctrine and Rule 4). Thus, this question is ripe for review.

The Fourth Circuit relied on the procedural standards of Rule 56 to support its holding that Resource was not entitled to insurance coverage for TCPA claims under the property damage provisions of the Policies. By reference to these procedural requirements, the Fourth Circuit concluded that Resource was obligated to submit additional evidence (outside the Indiana Complaint) to the district court in response to St. Paul's motion for summary judgment. It then held that Resource's failure to do so was a material omission, requiring that St. Paul's motion for summary judgment be granted. The Fourth Circuit reached this conclusion despite clear substantive authority from Virginia courts holding that no evidence other than the underlying complaint should be reviewed by courts in determining whether a duty to defend exists.

As noted above, the Fourth Circuit did not disguise its application of the Rule 56 procedural standards to reach its decision. It first stated that, "a party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but ... *must set forth specific facts* showing that there is a genuine issue for trial." App. 14a, 407 F.3d at 638-39 (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986)) (emphasis in original). It continued on to say that, "while Resource disputes the foreseeability of its consequences [from sending fax advertisements], this dispute is not a genuine one *under the summary judgment standards* ...." App. 14a, 407 F.3d at 639 (emphasis added). And again, in the next sentence, the Fourth Circuit stated that, "[b]ecause Resource ... fails to present evidence that could reasonably be mistaken as express permission to send these faxes, we can only conclude that the sending was not accidental." *Id.* It concluded its opinion by further emphasizing this point, stating that, "Resource presented us with no evidence that it sent its faxes accidentally. It thus *cannot avoid summary judgment* on the point that the 'property damage' provision provides no coverage for the class-action lawsuit." App. 20a, 407 F.3d at 642 (emphasis added). Thus, there is no question that the guiding principle for the Fourth Circuit's holding on the property damage provisions of the Policies was Rule 56 and its accompanying procedural requirements as outlined by this Court in decisions such as *Anderson v. Liberty Lobby*.

The plain error in this line of reasoning, however, is that Virginia substantive law clearly states that in construing an insurance policy to determine a

duty to defend a court must look **only** at the complaint in the underlying action and must **not** review evidence – i.e., any "facts" that might be submitted in opposition to a motion for summary judgment – outside the underlying complaint (in this case the Indiana Complaint). *Travelers Indem. Co. v. Obenshain*, 219 Va. 44, 46, 245 S.E.2d 247, 249 (1978) (holding that the court should look "**only** to the allegations of the motions [for judgment] to determine whether [the insurer] is obligated to provide [the insured] with coverage under its policy") (emphasis added); *Solers, Inc. v. Hartford Cas. Ins. Co.*, 146 F. Supp. 2d 785, 791 (E.D. Va. 2001) (holding that under Virginia's exclusive pleading rule, "an insurer's duty to defend is determined **solely** by the claims asserted in the pleadings .... Thus, the Court should look **only** to the allegations in SM & A's Amended Complaint to determine if the Policy provided coverage for Solers") (emphasis added); *Erie Ins. Exch. v. State Farm Mut. Auto. Ins. Co.*, 60 Va. Cir. 418, 423 (Warren County 2002) (recognizing the "eight corners rule" and noting that the court "looks **solely** at the policy language ... and at the allegations in the underlying action to determine whether any claims alleged therein are covered by the policy") (emphasis added). The United States District Court for the Eastern District of Virginia has described this standard as the "exclusive pleading rule," whereby "an insurer's duty to defend is determined **solely by the allegations** in the pleading." *Am. Online, Inc. v. St. Paul Mercury Ins. Co.*, 207 F. Supp. 2d 459, 465 (E.D. Va. 2002), *aff'd*, 347 F.3d 89 (4th Cir. 2003) (emphasis added). Other courts have characterized this standard as the "eight corners rule," whereby the court compares the four corners of the policy with the four corners of the complaint to determine whether a duty to defend

arises. *Id.* at 465. *See also Superformance Int'l v. Hartford Cas. Ins.*, 203 F. Supp. 2d 587, 592 (E.D. Va. 2002) ("Under the Exclusive Pleading Rule, an insurer's duty to defend is determined **solely** by the claims asserted in the pleadings.") (emphasis added), aff'd, 332 F.3d 215 (4th Cir. 2003).[2]

In this case, the Indiana Complaint includes allegations encompassing accidental conduct; therefore, a duty to defend is triggered. There is no need to resort to additional, outside evidence, because under Virginia substantive law in the duty to defend context the underlying complaint is the **only** relevant evidence for the court to review.[3] The evidence Resource did

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[2] The significance of the Fourth Circuit's departure from Virginia's "eight corners" rule is demonstrated by the potential aftermath of its ruling. The proof in the Underlying Litigation may yet be that Resource sent unsolicited faxes accidentally – i.e., under the mistaken belief that they had been solicited. Such proof could nonetheless result in liability under the TCPA's strict liability approach and would trigger St. Paul's duty to indemnify Resource for any judgment obtained by the plaintiffs – even though the Fourth Circuit held that, at the duty to defend stage, Resource failed to carry its alleged burden to introduce evidence to show accidental transmission. This awkward result is precisely the outcome Virginia's law is designed to avoid.

[3] The Fourth Circuit also appeared to rely in part on *Furrow v. State Farm Mutual Automobile Insurance Co.*, 237 Va. 77, 375 S.E.2d 738 (1989), which it cited in passing for the proposition that Resource bore the burden of proving coverage exists. 407 F.3d at 638. Importantly, however, *Furrow* was a case involving the **duty to indemnify**, not the duty to defend. 375 S.E.2d 738 (addressing whether plaintiff, the estate of the deceased insured, was a "resident" of her mother's household and thus covered by her mother's insurance). This distinction is crucial in the insurance coverage law context, particularly in a situation such as this

present was the Indiana Complaint. The Indiana Complaint alleges violations of the TCPA, and the TCPA imposes liability on fax senders who send unsolicited faxes innocently and accidentally under the mistaken belief that such faxes had been solicited. *Park Univ. Enter., Inc. v. Am. Cas. Co.*, 314 F. Supp. 2d 1094 (D. Kan. 2004) (recognizing breadth of TCPA liability and holding that TCPA claims trigger property damage coverage), *appeal docketed*, No. 04-3197 (10th Cir. June 2, 2004). When viewed in light of this standard, it is clear that the Indiana Complaint's claims trigger the property damage provision of St. Paul's policies because the TCPA's strict liability approach raises the specter of a judgment against Resource even if Resource accidentally sent faxes to persons whom it believed had requested them. *Erie Ins. Exch. v. Sipos*, 64 Va. Cir. 55 (Va. Cir. Ct. 2004) (holding that insured who disposed of property it mistakenly believed was unwanted debris was entitled to coverage because insured's actions were "accidental").

In light of the state substantive authority cited above setting forth the eight corners or exclusive pleading rule, the Fourth Circuit's holding that Resource's claim fails because it did not present any evidence outside the Indiana Complaint entails material error and is a misapplication of the Federal Rules of Civil Procedure to usurp a state substantive rule.

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involving solely the duty to defend. At the duty to indemnify stage, a court does look to evidence that has been proven in the underlying litigation to determine an insurer's coverage obligation. By contrast, at the duty to defend stage, the analysis is limited to the underlying complaint.

Since at least 1965 the position of this Court has been that a federal rule of civil procedure trumps a **directly conflicting** state law. *Hanna*, 380 U.S. at 470, 85 S.Ct. at 1143. The Court, however, has also recognized that, "[a]pplication of the *Hanna* analysis is premised on a 'direct collision' between the Federal Rule and the state law." *Walker*, 446 U.S. at 749, 100 S.Ct. at 1985. Where such a "direct collision" can be avoided, the *Hanna* analysis does not apply. *Id.* Thus, in *Walker* this Court held that Rule 3's directive that a "civil action is commenced by filing a complaint" did not trump a state substantive law regarding when a state statute of limitations is tolled (the state rule held that tolling, under the facts of that case, occurred upon service, not filing). *Id.*

Indeed, in a more recent decision addressing the interplay between Rule 41 and the *Erie* doctrine, this Court recognized that the Rules Enabling Act states that a federal rule of procedure "shall not **abridge**, enlarge or **modify** any substantive right." *Semtek*, 531 U.S. at 503, 121 S.Ct. at 1025-26 (emphasis added). Thus, Justice Scalia, writing for a unanimous Court, observed that if Rule 41 were interpreted to extinguish a party's claim that would otherwise survive under state law, such an interpretation "would in many cases violate the federalism principle of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-80, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), by engendering 'substantial' variations [in outcomes] between state and federal litigation which would likely influence the choice of forum." *Id.* (citations and internal quotation marks omitted).

The Fourth Circuit's decision, however, raises the same dangers Justice Scalia and this unanimous

Court found it important to avoid – namely, it violates the principle of federalism embodied in the *Erie* doctrine and engenders "substantial" variations in outcomes between federal and state courts that will influence the choice of forum, since insurance companies will undoubtedly seek a federal forum in an effort to impose additional evidentiary obligations on insureds that they would not face in state court. Furthermore, such an outcome would be highly inefficient and waste judicial resources, since it would turn every insurance coverage case – even those cases involving solely the duty to defend – into a mini-trial of the underlying litigation. For example, in this case, to comply with the obligations imposed upon Resource by the Fourth Circuit's Rule 56 application, Resource would have had to introduce substantially the same evidence before the district court that it will need to introduce at trial of the Underlying Litigation in the Indiana class action suit. Thus, under the Fourth Circuit's ruling, not only would the substantive rights of the citizen of the forum state (in this case Resource) be adversely impacted, but the choice of forum would be heavily skewed – each of which is a circumstance that *Erie's* federalism principles were designed to avoid.[4]

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[4] Even leaving aside the effect of Virginia law, the Fourth Circuit did not even properly apply Rule 56. In support of its motion for summary judgment St. Paul did not present any evidence other than the Indiana Complaint. Thus, there was never a material factual dispute regarding the potentially accidental nature of Resource's faxes at the district court level, other than the parties' conflicting interpretations of the significance of the claims made in the Indiana Complaint. In combating a motion for summary judgment that relied exclusively on the "eight corners" of the Indiana Complaint and the insurance policies, Resource was not required to present any additional evidence. Both the district court and the parties at both levels recognized this reality and

For these reasons, this Court should grant the writ of certiorari.

II. The Fourth Circuit's Decision Was Plain Error Warranting Review By this Court

This Court should also grant the writ of certiorari to exercise its supervisory function in ensuring that lower federal courts do not commit plain error in interpreting and applying state law.

As noted above, Virginia law has held for over twenty-five years that in the insurance coverage context, courts are to look **only** to the allegations of the underlying complaint in determining whether a duty to defend exists on the part of the insurer. *Travelers Indem. Co. v. Obenshain*, 219 Va. 44, 46, 245 S.E.2d 247, 249 (1978) (holding that the court should look "**only** to the allegations of the motions [for judgment] to determine whether [the insurer] is obligated to provide [the insured] with coverage under its policy") (emphasis added). *See also* cases cited in Section I, *supra*. The Fourth Circuit, however, explicitly based its holding with respect to the property damage issue on the alleged failure by Resource to present any **facts outside the underlying complaint** that its actions in sending the faxed advertisements to the plaintiffs in the Indiana Litigation were "accidental." This holding completely ignores decades of Virginia law and imposed a requirement on Resource that not only was without legal basis, but was never even considered by the

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never raised the Rule 56 issue relied upon by the Fourth Circuit in denying coverage under the property damage provisions of the Policies.

district court and was never raised by either party until the Fourth Circuit determined to base its holding on this issue.

This Court has held that it will not defer to lower courts on state law issues where the lower court's ruling is plain error, clearly wrong, or the construction is clearly erroneous or unreasonable. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 fn. 9, 105 S.Ct. 2794 (1985) (noting deference to lower courts on state-law issues unless there is "plain error," the view of the lower court is "clearly wrong," or the construction is "clearly erroneous" or "unreasonable"). The Fourth Circuit's decision in this case fits each of these descriptors. And without this Court's review, Resource is left with no alternative to cure the unreasonable and clearly wrong holding of the appeals court – which, as noted above, imposed a requirement upon Resource that had never been contemplated by either party or the district court until the Fourth Circuit announced it in its decision.

Under these circumstances, the Court should grant the writ of certiorari to reverse the Fourth's Circuit's plain error.

III. The Fourth Circuit Split with the Fifth Circuit Over the Privacy Interests Protected by the TCPA

Finally, the Court should grant review to address the circuit split over the privacy interests protected by the TCPA. In its decision, the Fourth Circuit improperly limited the privacy interests of the

TCPA (and the privacy language of the Policies) and thus denied coverage under the advertising injury provisions of the Policies. This ruling places it in line with the Seventh Circuit[5] but at odds with the Fifth Circuit, which affirmed a district court decision finding the TCPA to reach a broad array of privacy interests and concluding that coverage exists under virtually identical policy language. *See Western Rim Investment Advisors, Inc. v. Gulf Ins. Co.*, No. 03-10707, 96 Fed. Appx. 960 (5th Cir. May 19, 2004) (unpublished). And cases are currently pending before the Eleventh and Tenth Circuits which raise the same issues. *See Park Univ. Enter., Inc. v. Am. Cas. Co. of Reading, Pa.*, 314 F. Supp. 2d 1094 (D. Kan. 2004) (finding coverage under advertising injury provisions and property damage provisions), *appeal docketed*, No. 04-3197 (10th Cir. Jun. 2, 2004); *Hooters of Augusta, Inc. v. Am. Global Ins. Co.*, 272 F. Supp. 2d 1365 (S.D. Ga. 2003) (finding coverage under advertising injury provisions), *appeal docketed*, No. 04-11077-EE (11th Cir. Mar. 8, 2004).

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[5] The Seventh Circuit's decision, *American States Insurance Co. v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939, 943 (7th Cir. 2004), which applied Illinois law, has been rendered suspect by the recent decision of the Illinois intermediate appeals court in *Valley Forge Insurance Company v. Swiderski Electronics, Inc.*, No. 2-04-0910 (Ill. Ct. App., 2d Dist., Aug. 2005) (reported at http://www.state.il.us/court/Opinions/AppellateCourt/2005 - /2ndDistrict/August/Html/2040910.htm), which rejected the Seventh Circuit's advertising injury analysis and held that an insurer was required to defend its insured in underlying litigation alleging violations of the TCPA. The *Valley Forge* court recognized that TCPA privacy interests are not limited in scope to the common law torts of either intrusion upon seclusion or publication of secret facts, but rather encompass the broad privacy right "to be left alone," as that term has been used historically by this Court and others.

While it limited their scope, the Fourth Circuit (and the district court) did not question whether the TCPA protects privacy interests, because the record is clear that it does. For example, the House of Representatives Report from the Committee on Energy and Commerce explicitly stated the following:

> The purpose of the bill (H.R. 1304) is to protect residential telephone subscriber privacy rights by restricting certain commercial solicitation and advertising uses of the telephone **and related telecommunications equipment**. Specifically, the bill makes it unlawful within the United States to use the telephone, or automatic dialing recorded message player (ADRMP) systems, to solicit individuals who have objected to receiving commercial telephone solicitations. In addition, **it restricts use of facsimile machines ... to send unsolicited advertisements**.

H. R. Rep. No. 102-317 at 8 (emphasis added). As this language illustrates, Congress' concern about the impact on telephone subscriber privacy rights specifically recognized the impact on privacy of "related telecommunications equipment," including facsimile machines.

In addition, the TCPA itself states that one of its purposes is to protect privacy rights. 47 U.S.C. §§ 227(b)(2)(B)(ii)(I), 227(b)(2)(C), 227(c), 227(c)(2). These statements are not limited to the non-facsimile provisions, but refer generally to the entire statute. *See, e.g.*, 47 U.S.C. § 227(b)(2)(B)(ii)(I) (referencing "the privacy rights that this section [*i.e.*, § 227] is intended to protect").

Moreover, in signing the final version of the Act, President George H. W. Bush noted that the TCPA "is designed for the laudable purpose of protecting the privacy rights of telephone users." Signing Statement of Pres. George H.W. Bush, 27 Weekly Comp. of Pres. Documents, 1877, Dec. 23, 1991.

The Fourth Circuit, however, limited the privacy interests protected by the TCPA to the "seclusion" species of privacy right. As previously noted, the court divided up the entire realm of privacy interests into two distinct principal strands – "secrecy" and "seclusion." App. 16a – 17a, 407 F.3d at 640. It then stated that, "if the class-action complaint [alleging violations of the TCPA] alleges any violation of privacy, it is 'seclusion' privacy." App. 17a, 407 F.3d at 641. Later in its decision the court observed that, "we see quite easily how the TCPA might facilitate interstate commerce by allowing owners of fax machines sufficient *seclusion* to do with their fax-dedicated phone line and fax machine as they wished without sifting through stacks of unwanted faxes that deplete their paper and toner." App. 19a, 407 F.3d at 642 (emphasis in original).

There is no basis, however, for defining the privacy right at issue in the TCPA by reference to particular "strands" of the privacy right that have developed in common law remedies. In making this determination, the Fourth Circuit did not reference this Court's long history of recognition of the state's significant interest in protecting the right of citizens "to be left alone," which Justice Brandeis once described as "the right most valued by civilized men." *Hill v. Colorado*, 530 U.S. 703, 717-17, 120 S.Ct. 2480 (2000)

(quoting *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564 (1928) (Brandeis, J., dissenting)).

This universal right to be left alone, which is the fundamental premise upon which state common law remedies are founded and is of a higher order than the "strands" of privacy remedies that have been recognized in state procedure, is surely the "privacy" right that the framers of the TCPA envisioned in drafting the legislation, as opposed to the sliver of privacy interest that remained after the Fourth Circuit whittled the statute down in an effort to minimize insurance coverage. In fact, it is this broad right that other federal courts have recognized as supporting the TCPA when the statute has been challenged on First Amendment grounds. *See Mainstream Marketing Services, Inc. v. F.T.C.*, 358 F.3d 1228, 1237-38 (10th Cir. 2004) (recognizing strong government interest in privacy supporting the TCPA and reviewing line of privacy decisions from this Court). The Fourth Circuit, however, did not recognize this authority and in failing to do so improperly limited the scope of the TCPA's underlying interests – a limitation that will surely be recognized by future litigants both inside and outside the coverage context, including those who would attack the TCPA on constitutional grounds.

In sum, this Court should grant the writ of certiorari to address the circuit split involving the advertising injury provisions of the Policies and the attendant varying interpretations of the TCPA's underlying interests.

CONCLUSION

For the reasons set forth above, the Court should grant the writ of certiorari and reverse the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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(any footnotes trail end of each document)
No. 04-1946, No. 04-1962

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESOURCE BANKSHARES CORPORATION;
RESOURCE BANK,
Plaintiffs-Appellees,

v.

ST. PAUL MERCURY INSURANCE COMPANY,
Defendant-Appellant.

AMERICAN CASUALTY COMPANY OF
READING, PENNSYLVANIA; ERIE INSURANCE
COMPANY; FEDERAL INSURANCE
CORPORATION; GREAT NORTHERN
INSURANCE COMPANY,
Amici Supporting Appellant.

RESOURCE BANKSHARES CORPORATION;
RESOURCE BANK,
Plaintiffs-Appellants,

v.

ST. PAUL MERCURY INSURANCE COMPANY,
Defendant-Appellee.

AMERICAN CASUALTY COMPANY OF
READING, PENNSYLVANIA; ERIE INSURANCE
COMPANY; FEDERAL INSURANCE

CORPORATION; GREAT NORTHERN INSURANCE COMPANY,
Amici Supporting Appellee.

March 17, 2005, Argued

May 11, 2005, Decided

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ON BRIEF: Alan B. Rashkind, FURNISS, DAVIS, RASHKIND AND SAUNDERS, P.C., Norfolk, Virginia, for St. Paul Mercury Insurance Company.

R. Johan Conrod, Jr., KAUFMAN & CANOLES, Norfolk, Virginia, for Resource Bankshares Corporation and Resource Bank.

Andrew Butz, William H. White, Jr., BONNER KIERNAN TREBACH & CROCIATA, Washington, D.C., for Amicus Curiae American Casualty Company of Reading, PA, Supporting St. Paul Mercury Insurance Company.

Vernon Priddy, III, SANDS, ANDERSON, MARKS & MILLER, Richmond, Virginia; Daniel J. Cunningham, Kathleen A. Sweitzer, TRESSLER, SODERSTROM, MALONEY & PRIESS, Chicago, Illinois, for Amici Curiae Erie Insurance Company, Federal Insurance

Company, and Great Northern Insurance Company, Supporting St. Paul Mercury Insurance Company.

JUDGES: Before KING and GREGORY, Circuit Judges, and HAMILTON, Senior Circuit Judge. Judge Gregory wrote the opinion, in which Judge King and Senior Judge Hamilton joined.

OPINION BY: GREGORY

OPINION: GREGORY, Circuit Judge:

On March 8, 2002, Cohen & Malad, LLP, an Indiana limited partnership, sued Resource Bankshares Corporation and Resource Bank ("Resource") in Indiana state court on behalf of a class of recipients of Resource's faxes. The lawsuit was based on the private right of action provided by the Telephone Consumer Protection Act, 47 U.S.C. § 227 (2003) ("TCPA"). During the times relevant to the lawsuit, Resource had a series of materially identical one-year general commercial liability insurance policies with St. Paul Mercury Insurance Company ("St. Paul"). Resource sought a declaration in the United States District Court for the Eastern District of Virginia that the class-action suit triggered coverage under two separate provisions of the policies. On cross-motions for summary judgment, the district court found that one of the two provisions mandated a duty to defend. We hold that the policies do not compel St. Paul to defend Resource for the class-action suit, and thus affirm in part and reverse in part the decision of the district court.

I.

The TCPA prohibits, among other things like the use of certain automated telephone equipment for telemarketing, the use of "any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." *Id.* § 227(b)(1)(C). Section 227(b)(3) creates a private right of action so recipients of such faxes can sue the senders. It provides that:

> (1) A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State[1]
>
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.
>
> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

Id.

The Indiana class-action complaint alleged that Resource violated the TCPA by engaging in the mass

transmission of unsolicited fax advertisements over a period of four years to an unknown class of recipients, numbering at least 40. Consistent with the straightforward and content-free nature of the TCPA, beyond simply noting that the faxes were advertisements, the class-action complaint never claimed that the faxes' content injured anyone (by, for example, claiming that the fax libeled them, divulged a trade secret, or infringed on a trade-mark). Rather, the complaint indicated that the mere receipt of the ads was harmful. [2]

The insurance policies at issue, written in admirably plain English, contain two relevant provisions: one describing the coverage for "property damage" caused by an "event" and one for damages resulting from an "advertising injury offense." The property-damage provision states that St. Paul will "pay amounts any protected person is legally required to pay as damages for covered bodily injury or property damage," J.A. 41, and explains that:

> *Property damage* means:
>
> . physical damage to tangible property of others, including all resulting loss of use of that property; or
>
> . loss of use of tangible property of others that isn't physically damaged.

J.A. 42. To trigger coverage under this provision, any property damage must flow from an "event," which the policies define as "an *accident*, including continuous or

repeated exposure to substantially the same general harmful conditions." J.A. 42 (emphasis added).

As for the "advertising injury" provision, the policies state that:

> We'll pay amounts any protected person is legally required to pay as damages for covered advertising injury that:
>
> . results from the advertising of your products, work or completed work; and
>
> . is caused by an advertising injury offense committed while this agreement is in effect.

J.A. 43. The limitation to "advertising injury offense" means that coverage extends only to damages arising from the following offenses:

> . Libel or slander.
>
> . Making known to any person or organization written or spoken material that disparages the products, work, or completed work of others.
>
> . *Making known to any person or organization written or spoken material that violates a person's right of privacy.*
>
> . Unauthorized use of any advertising idea, material, slogan, style, or title of others in your advertising.

J.A. 43 (emphasis added). The third-listed offense - "making known to any person or organization written or spoken material that violates a person's right of privacy" - is chiefly at issue here.

Resource notified St. Paul of the suit and claimed coverage, which, on June 4, 2002, St. Paul denied. On August 7, 2002, a district court in North Carolina issued an opinion styled *Prime TV, LLC v. Travelers Ins. Co.*, 223 F. Supp. 2d 744 (M.D.N.C. 2002). *Prime TV* held that, under North Carolina law, both the "property damage" and "advertising injury" sections of the insurance policy in that case mandated coverage for a suit alleging a TCPA violation. In June of the next year Resource told St. Paul of the *Prime TV* case and argued that the policy was materially identical to St. Paul's. St. Paul again denied that the policies entitled Resource to coverage. Then, on November 4, 2003, Resource brought this declaratory judgment action. Resource seeks a declaration that St. Paul must defend, indemnify, and reimburse Resource for all costs associated with the class-action litigation.

The parties filed cross-motions for summary judgment. Recognizing that courts of several other jurisdictions had already held for insureds seeking coverage for defense of TCPA suits under generally similar policies,[3] the district court held that the "property damage" provision was inapplicable because Resource's conduct was not an "accident," J.A. 81-84, but found that the advertising injury offense provision applied because the faxes violated the recipient's "right to privacy." J.A. 74-80. Both parties appeal the judgments unfavorable to them.

II.

We review *de novo* a grant of summary judgment, *Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 419 (4th Cir. 2004), which is to be given when no genuine issue of material fact remains for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is proper "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249 (citations omitted).

A federal court hearing a diversity claim must apply the choice-of-law rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941); *Am. Online, Inc. v. St. Paul Mercury Ins. Co.*, 347 F.3d 89, 92 (4th Cir. 2003). This appeal arises from a complaint filed in the Eastern District of Virginia, so we look to Virginia's choice-of-law rules.

"Under Virginia law, a contract is made when the last act to complete it is performed, and in the context of an insurance policy, the last act is the delivery of the policy to the insured." *Seabulk Offshore*, 377 F.3d at 419; *Buchanan v. Doe*, 246 Va. 67, 431 S.E. 2d 289, 291, 9 Va. Law Rep. 1446 (Va. 1993) ("generally, the law of the place where an insurance contract is written and delivered controls issues as to its coverage."). Since the policies were delivered to Resource in Virginia, the parties correctly agree that Virginia law governs. "Under Virginia law, an insurer's obligation to defend

an action 'depends on comparison of the policy language with the underlying complaint to determine whether the claims alleged [in the complaint] are covered by the policy.'" *Am. Online*, 347 F.3d at 93 (quoting *Superperformance Int'l, Inc. v. Hartford Cas. Ins. Co.*, 332 F.3d 215, 220 (4th Cir. 2003)); *see Erie Ins. Exch. v. State Farm Mut. Auto Ins. Co.*, 60 Va. Cir. 418, 423 (Va. Cir. Ct. 2002) (courts apply the "eight corners rule," comparing the four corners of the policy with the four corners of the complaint). A policyholder bears the burden of proving that the policyholder's conduct is covered by the policy. *See Furrow v. State Farm Mut. Auto. Ins. Co.*, 237 Va. 77, 375 S.E. 2d 738, 740, 5 Va. Law Rep. 1427 (Va. 1989) (citing *Md. Cas. Co. v. Cole*, 156 Va. 707, 158 S.E. 873, 876 (Va. 1931)). Yet this burden is not especially onerous since the insurer must defend unless "it clearly appears from the initial pleading the insurer would not be liable under the policy contract for *any* judgment based upon the allegations." *Reisen v. Aetna Life and Cas. Co.*, 225 Va. 327, 302 S.E. 2d 529, 531 (Va. 1983) (citing *Travelers Indem. Co. v. Obenshain*, 219 Va. 44, 245 S.E. 2d 247, 249 (1978)). The duty to defend is broader than the duty to indemnify because it "arises whenever the complaint alleges facts and circumstances, some of which, if proved, would fall within the risk covered by the policy." *Brenner v. Lawyers Title Ins. Corp.*, 240 Va. 185, 397 S.E. 2d 100, 102 (Va. 1990); *Reisen*, 302 S.E. 2d at 531. "However, if it appears clearly that the insurer would not be liable under its contract for any judgment based upon the allegations, 'it has no duty even to defend.'" *Brenner* at 102 (quoting *Obenshain*, 245 S.E. 2d at 249).

In Virginia "an insurance policy is a contract to be

construed in accordance with the principles applicable to all contracts." *Seabulk Offshore, Ltd.*, 377 F.3d at 419 (citing *Graphic Arts Mut. Ins. Co. v. C.W. Warthen Co.*, 240 Va. 457, 397 S.E. 2d 876, 877, 7 Va. Law Rep. 895 (Va. 1990)). As with other contracts, when interpreting a policy courts must not strain to find ambiguities, *see, e.g., Salzi v. Virginia Farm Bureau Mut. Ins. Co.*, 263 Va. 52, 556 S.E. 2d 758, 760 (Va. 2002) ("'As in the case of any other contract, the words used are given their ordinary and customary meaning when they are susceptible of such construction.'") (quoting *Graphic Arts*, 397 S.E. 2d at 877), or examine certain specific words or provisions in a vacuum, apart from the policy as a whole. *See, e.g., TM Delmarva Power, L.L.C. v. NCP of Va., L.L.C.*, 263 Va. 116, 557 S.E. 2d 199 (Va. 2002); *First Am. Title Ins. Co. v. Seaboard Sav. & Loan Ass'n*, 227 Va. 379, 315 S.E. 2d 842, 845 (Va. 1984). A policy provision is ambiguous when, in context, it is capable of more than one reasonable meaning. *See Caldwell v. Transp. Ins. Co.*, 234 Va. 639, 364 S.E. 2d 1, 3, 4 Va. Law Rep. 1611 (Va. 1988) (citing *St. Paul Ins. v. Nusbaum & Co.*, 227 Va. 407, 316 S.E. 2d 734 (Va. 1984)).

Because insurance companies typically draft their policies without the input of the insured, the companies bear the burden of making their contracts clear. Accordingly, if an ambiguity exists, it must be construed against the insurer. *See, e.g., Craig v. Dye*, 259 Va. 533, 526 S.E. 2d 9 (Va. 2000); *First Am. Title Ins. Co.*, 364 S.E. 2d at 3; *Ocean Accident & Guar. Corp. v. Washington Brick & Terra Cotta Co.*, 148 Va. 829, 139 S.E. 513, 517 (Va. 1927) ("It is a well recognized rule that insurance policies, in case of doubt, should be construed most strongly against the insurer. But this

does not authorize the court to make a new contract for the parties, nor to adopt a construction not justified by the language or intent of the parties.").

III.

For the following reasons, we hold that neither the "property damage" nor the "advertising injury" provision covers the class-action lawsuit. St. Paul thus owes Resource no duty to defend the suit.

A.

As the policy language quoted above makes plain, Resource is entitled to coverage for "property damage" liability only for actions that are reasonably termed an "accident."[4] What can be called an "accident" has, at times, been a puzzling question.[5] Yet often, as here, the answer is clear enough.

To decide whether something is an accident under an insurance policy, Virginia courts ask whether an event was a natural and probable consequence of the insured's intended actions. Under this formulation, an accident "is an event which creates an effect which is not the natural or probable consequence of the means employed and is not intended, designed, or reasonably anticipated." *Lynchburg Foundry Co. v. Irvin*, 178 Va. 265, 16 S.E. 2d 646, 648 (1941); *see also Citizens Home Ins. Co. v. Nelson*, 218 Va. 216, 237 S.E.2d 100, 102 (Va. 1977) (same). Stated otherwise, the question is whether the incident or injury was a reasonably foreseeable result of the insured's actions. *See, e.g., Patch v. Metro. Life Ins. Co., 733 F.2d 302, 304 (4th Cir. 1984)* (noting that the crucial inquiry in the "natural or probable

consequence" test is the "forseeability of consequences and not intent of the insured"); *Utica Mut. Ins. Co. v. Travelers Indem. Co.*, 223 Va. 145, 286 S.E. 2d 225, 226 (Va. 1982) (accident is an "incident unexpected from the viewpoint of the insured"; intentional actions are not accidents); *Smith v. Combined Ins. Co. of Am.*, 202 Va. 758, 120 S.E. 2d 267, 268 (Va. 1961) (insured who resisted arrest, wounded a police officer, and took refuge in a building that was set on fire by police tear gas bombs was not entitled to benefits from accidental-death policy because his death was a reasonably foreseeable consequence of his actions); *Ocean Accident & Guarantee Corp. v. Glover*, 165 Va. 283, 182 S.E. 221, 222 (Va. 1935) (adopting a common-language dictionary definition of "accident"); *Baker v. Va. Employment Comm'n*, 1998 WL 972284 (Va. Cir. Ct. 1998) (an accident "is a befalling; an event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; a mishap resulting in injury to a person or thing." (citing *Derby v. Swift & Co.*, 188 Va. 336, 49 S.E. 2d 417 (Va. 1948)).

Resource does not deny that it intentionally sent advertisements by fax. Rather, as we understand it, Resource submits the possibility that it only intended to fax ads to recipients who actually wanted them, and only did otherwise inadvertently. In other words, Resource suggests that it could not foresee that the faxes were *unsolicited*. In support of the claim that a TCPA violation could be an accident, Resource cites *Park University Enterprises, Inc. v. American Casualty Co. of Reading, PA*, 314 F. Supp. 2d 1094 (D. Kan. 2004). Resource also cites several cases from other contexts (although none from the Virginia Supreme Court) which could all be called "mistaken identity

means accidental action." These cases basically hold that various actions which are not necessarily injurious when consent exists can be an accident under insurance law when they are mistakenly performed on an *unconsenting* party. *See, e.g., York Indus. Ctr., Inc. v. Mich. Mut. Liab. Co.*, 271 N.C. 158, 155 S.E. 2d 501 (N. C. 1967) (under North Carolina law, insured who intentionally cut down a neighbor's trees in the mistaken belief that they were on the insured's property was covered by accident insurance); *Erie Ins. Exchange v. Sipos*, 64 Va. Cir. 55 (Va. Cir. Ct. 2004) (insured who disposed of property from an apartment under the mistaken belief that it was unwanted debris when it really belonged to a new tenant was entitled to coverage because action was an accident).[6]

Resource's "accidental fax" argument does not persuade us. The TCPA prohibits all *unsolicited* advertisements sent by fax. Specifically, the TCPA defines the term by noting that "the term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's *prior express invitation or permission.*" 47 U.S.C. § 227(a)(4) (2003) (emphasis added). Here lies the problem: Resource has offered precisely no evidence that would cause a reasonable person to mistakenly believe that they had received prior express consent to send their fax ads.

Without such evidence, Resource cannot begin to carry its burden, *see Furrow*, 375 S.E. 2d at 740, of establishing that its conduct potentially merits coverage, even though at this stage in the proceedings all that it needs to prove is that a reasonable jury could

find as much, *see Anderson v. Liberty Lobby*, 477 U.S. at 249 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." (citations omitted)). As *Anderson* explained, "a party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but ... *must set forth specific facts* showing that there is a genuine issue for trial.'" *Id.* at 248 (quoting Fed. R. Civ. P. 56(e)) (emphasis added). Thus, while Resource disputes the forseeability of its consequences, this dispute is not a genuine one under the summary judgment standards and, unlike *Universal Underwriters*, 401 F.3d at 882, the forseeability of Resource's conduct is not "an open factual question," *id.* Because Resource plainly (1) intended to transmit the faxes to *someone*, and (2) fails to present evidence that could reasonably be mistaken as express permission to send these faxes, we can only conclude that the sending was not accidental. It is obvious to anyone familiar with a modern office that receipt is a "natural or probable consequence" of sending a fax, and receipt alone occasions the very property damage the TCPA was written to address: depletion of the recipient's time, toner, and paper, and occupation of the fax machine and phone line. In this way we fully agree with the Seventh Circuit's opinion on this issue in *American States Ins. Co.*, 392 F.3d 939, 943 (7th Cir. 2004), which explained that:

> junk faxes use up the recipient's ink and paper, but senders anticipate that consequence. Senders may be uncertain whether particular faxes violate § 227(b)(1)(C) but all senders know exactly how faxes deplete recipients'

> consumables ... Because *every* junk fax invades the recipient's property interest in consumables, this normal outcome is not covered.

Id.; see also W. Rim Inv. Advisors, Inc. v. Gulf Ins. Co., 269 F. Supp. 2d 836 (N. D. Tex. 2003). Accordingly, we affirm the district court's grant of summary judgment to St. Paul on the "property damage" provision.

B.

Resource's other claim is based exclusively on the third prong of the advertising-injury offense part of the policies: "making known to any person or organization written or spoken material that violates a person's right to privacy." J.A. 43.

We first note that neither the class-action complaint nor the TCPA's private right of action ever actually mentions the word "privacy. " *See* J.A. 14-19. Rather, the district court held that the complaint implied an allegation of a right-to-privacy violation.[7] We can grant to Resource that the harm occasioned by unsolicited faxes involves protection of some sort of "privacy." Junk faxes cause some economic damage (each instance may be small but is nonetheless real, and the amount becomes especially serious when aggregated) and what might be called *some* kind of harm to privacy (in the same sense that certain nuisances invade privacy). The TCPA's private right of action obviously meant to remedy and prevent these twin harms, so the class-action complaint could imply *some* sort of "privacy" concern.[8] But the word privacy carries different meanings in different contexts,[9] and if any overlap exists between the complaint's "implied privacy" and

the policies' explicit use of the word it is only nominal (both in the sense that it is in name only and that it is trivial). But, contrary to Resource's contentions, this nominal overlap does not necessarily result in *ambiguity*. Every word in this sentence contains different meanings, but all read clearly in context.

The real question, then, is whether, when read *in context*, a reasonable purchaser of insurance would believe that the sort of privacy interests protected by the policies overlap with the sort of privacy with which the TCPA is concerned. *See American States*, 392 F.3d at 942 ("To say, as the district court did, that § 227(b)(1)(C) protects privacy, and then stop the analysis, is to avoid the central question in the case: whether the policies cover the sort of seclusion interests affected by faxed ads."). In *American States* the Seventh Circuit adeptly analyzed the two types of "privacy" really at issue in insurance coverage disputes for TCPA lawsuits. We approve of its analysis, and hold that the St. Paul policies do not cover the sorts of privacy invasions envisioned by the TCPA's unsolicited fax prohibition. As Judge Easterbrook explained:

> "Privacy" is a word with many connotations. The two principal meanings are secrecy and seclusion, each of which has multiple shadings. *See* Restatement (Second) of Torts § 652 (1977); Richard S. Murphy, *Property Rights as Personal Information*, 84 Geo. L.J. 2381 (1996). A person who wants to conceal a criminal conviction, bankruptcy, or love affair from friends or business relations asserts a claim to privacy in the sense of secrecy. A person who wants to stop solicitors from ringing his doorbell and peddling

> vacuum cleaners at 9 p.m. asserts a claim to privacy in the sense of seclusion. Some other uses of the word "privacy" combine these senses: for example, a claim of a right to engage in consensual sexual relations with a person of the same sex, or to abort an unwanted pregnancy, has both informational (secrecy) and locational (seclusion) components, with an overlay of substance (the objection to governmental regulation).

American States, 392 F.3d at 941. This passage puts words to the gut instinct one feels when comparing the class-action complaint with St. Paul's policies: if the class-action complaint alleges any violation of privacy, it is "seclusion" privacy. It is concerned with the manner of the advertisement. In contrast, the advertising-injury offense part of the policies is exclusively concerned with those types of privacy, *see* Prosser, *supra* n. 9, which, like secrecy, are implicated by *content* of the advertisements.

Consider closely the text and context of the operative sentence. It states that coverage exists for advertisements "making *known* to any person or organization written or spoken material that violates a person's right to privacy." J.A. 43 (emphasis added). It requires undue strain to believe that sending an unsolicited fax ad that has no private information or content (but rather simply advertised fairly the sender's wares) can reasonably be said to "make known" material that violates a person's[10] right to privacy. It surely seems to us that the plainest and most common reading of the phrase indicates that "making known" implies telling, sharing or otherwise divulging, such

that the injured party is the one whose private material is *made known*, not the one *to whom* the material is made known.

But this alone is not the key to the case; applying the commonsense canon of construction compelling courts to look to the immediate context of a word or phrase for interpretive guidance gets to the heart of the matter. As noted above, the policies promise to pay for damages from injuries arising from:

> . Libel or slander
>
> . Making known to any person or organization written or spoken material that disparages the products, work, or completed work of others.
>
> . Making known to any person or organization written or spoken material that violates a person's right to privacy.
>
> . Unauthorized use of any advertising idea, material, slogan, style, or title of others in your advertising.

J.A. 43. First, the meaning of "making known" in the third-listed offense is also informed by its next-door neighbor, which provides coverage for making known disparaging material. It is difficult to imagine how "making known" disparaging material harms the *recipient* of the material. Rather, it is clear to us that both of these "making known" provisions focus on harm to a third party. Moreover, these four offenses all share the common thread of assuming that the victim of the advertising injury offense is harmed by the sharing of

the content of the ad, not the mere receipt of the advertisement. *See, e.g.*, Select Design, Ltd. v. Union Mut. Fire Ins. Co., 165 Vt. 69, 674 A.2d 798, 802 (Vt. 1996) ("The term 'advertising injury, 'as ... construed in an overwhelming majority of reported cases, is injury to another that results from the *content* of statements about the products or services of the insured.").

But broadly prohibiting junk fax ads has nothing at all to do with the content of any ads. For example: a single, unsolicited page with nothing but a three-word slogan (perhaps "Refinance with Resource" or "Just Do It") or even a name or an abstract squiggle alone - if it can be construed as an ad (say, "Nike," or its famous "Swoosh" trade-mark) - violates the TCPA and triggers the private right of action. However, a *solicited* ad that somehow manages to simultaneously defame, libel, tell trade secrets, and infringe ten trademarks, may incur lots of legal liability but is in no way prohibited by the TCPA.

In contrast, however, we see quite easily how the TCPA might facilitate interstate commerce by allowing owners of fax machines sufficient *seclusion* to do with their fax-dedicated phone line and fax machine as they wished without sifting through stacks of unwanted faxes that deplete their paper and toner. In our view, then, the TCPA's unsolicited fax prohibition provides one small bit of sanctuary from certain solicitations, but does not even hint at protecting anyone from private facts being divulged through an advertisement (which, of course, the policies plainly do). Accordingly, the privacy prong of the advertising injury provision cannot be construed to cover a violation of the TCPA.

One does not have to look far to find how a policy could have been written differently in order to secure coverage for TCPA violations. After oral argument in this case, the Eighth Circuit decided *Universal Underwriters*, 401 F.3d 876, which Resource claims aids them. In *Universal Underwriters*, the policy at issue promised to pay all damages arising from, among other things, "private nuisance (except pollution), [and] invasion of rights of privacy ..." and did not limit or qualify these terms. *Id.* at 881. An unwanted fax is a paradigmatic private nuisance, and we think the "invasion of rights of privacy" provision's proximity to the private nuisance language, but separation from "advertising injury," surely had to influence the Eighth Circuit's reasoning. Indeed, *Universal Underwriters* took care to distinguish *American States*, 392 F.3d 939, where, like this case, the privacy provision was embedded in an advertising injury part. *See Universal Underwriters*, 401 F.3d at 882-83.

The point is that context matters, and here, like *American States* and unlike *Universal Underwriters*, the context points against coverage. We must therefore reverse the ruling of the district court finding that the privacy clause imposes a duty to defend Resource.

IV.

To sum up: simply sending a fax is what causes the property damage protected by the TCPA and alleged in the class-action lawsuit, and Resource presented us with no evidence that it sent its faxes accidentally. It thus cannot avoid summary judgment on the point that the "property damage" provision provides no coverage for the class-action lawsuit. Moreover, the TCPA's

unsolicited fax prohibition protects "seclusion" privacy, for which content is irrelevant. Unfortunately for Resource, it did not buy insurance policies for seclusion damages; instead, it insured against, among other things, damages arising from violations of content-based privacy. This reasonable, non-technical distinction precludes coverage for an "advertising injury offense."

For the foregoing reasons, we remand to the district court in order to grant St. Paul's motions for summary judgment and deny Resource's pursuant with this opinion. The judgment of the district court is thus

AFFIRMED IN PART AND REVERSED IN PART.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 We have previously interpreted this portion of the statute to mean that state courts have exclusive jurisdiction for private TCPA actions. *See Int'l Sci. & Tech. Inst., Inc. v. Inacom Communs.*, 106 F.3d 1146 (4th Cir. 1997).

n2 In this regard, the complaint stated:

> 3. ...With regard to fax advertising in particular, the United States Congress recognized that the proliferation of facsimile machines had been accompanied by explosive growth in unsolicited facsimile advertising, or 'junk faxes.'
>
> 4. Congress further noted that fax advertisers took advantage of fax machines by sending advertisements to available fax numbers,

> knowing the fax would be received and printed by the recipient's machine. Congress found this practice problematic for two (2) reasons: (i) it shifts some of the costs of advertising from the sender to the recipient; and (ii) it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk faxes.

J.A. 14-15.

n3 *See Park Univ. Enters. v. Am. Cas. Co. of Reading*, 314 F. Supp. 2d 1094 (D. Kan. Apr. 15, 2004); *Registry Dallas Assocs., L.P. v. Wausau Bus. Ins. Co.*, 2004 U.S. Dist. LEXIS 5771, 2004 WL 614836 (N. D. Tex. Feb. 26, 2004); *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*, 300 F. Supp. 2d 888 (E. D. Mo. 2004), *aff'd*, 401 F.3d 876 (8th Cir. 2005); *Am. States Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 2003 U.S. Dist. LEXIS 25532, 2003 WL 23278656 (S. D. Ill. Dec. 9, 2003) (advertising injury provision mandates coverage), *rev'd*, 392 F.3d 939 (7th Cir. 2004); *Hooters of Augusta, Inc. v. Am. Global Ins. Co.*, 272 F. Supp. 2d 1365 (S. D. Ga. 2003); *W. Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836 (N. D. Tex. 2003); *Prime TV*, 223 F. Supp. 2d 744; *TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W. 3d 232 (Tx. Ct. App. Feb. 11, 2004); *Merchant's & Businessmen's Mut. Ins. Co. v. A.P.O. Health Co., Inc.*, 228 N.Y.L.J. 22 (N. Y. Sup. Ct. Aug. 29, 2002).

n4 St. Paul also contends that no "property damage" was ever implicated by the class-action lawsuit. Because a separate fatal flaw exists in Resource's property-damage claim - the fact that sending the faxes

was not an "accident" - the district court did not address this question, and neither do we.

n5 As one court wrote,

> Everyone knows what an accident is until the word comes up in court. Then it becomes a mysterious phenomenon, and, in order to resolve the enigma, witnesses are summoned, experts testify, lawyers argue, treatises are consulted and even when a conclave of twelve world-knowledgeable individuals agree as to whether a certain set of facts made out an accident, the question may not yet be settled, and it must be reheard in an appellate court.

Brenneman v. St. Paul Fire & Marine Ins. Co., 411 Pa. 409, 192 A.2d 745, 747 (Pa. 1963); *see also Aetna Ins. Co. v. Carpenter*, 170 Va. 312, 196 S.E. 641, 646 (Va. 1938) ("The word 'accidental' is not easy to define in specific legal terms applicable to every case."); *see generally* Adam F. Scales, *Man, God, and the Serbonian Bog: the Evolution of Accidental Death Insurance*, 86 Iowa L. Rev. 173 (2000) (explaining the longstanding difficulties faced in deciding whether a death was "accidental" and proposing a solution).

n6 Resource also claims a case from this court, *Atlantic Permanent Federal Savings & Loan Association v. American Casualty Co.*, 839 F.2d 212 (4th Cir. 1998), for the proposition that "Virginia courts have never extended the 'intentional wrongdoing' defense to conduct which, though itself 'intentional, 'was not intended to cause injury." *Id.* at 217. We pause to note *Atlantic Permanent's* inapplicability to this context.

This quote is plucked from a section dealing with an argument regarding whether Virginia's public policy prohibited issuing insurance policies for actions which, while intentionally done, were not intended to cause injury. *See id.* That we earlier noted that Virginia law did not affirmatively make such actions *uninsurable* is entirely different from saying that *this* type of policy - one covering accidents - actually covers the conduct at issue in this case.

n7 St. Paul argues that since the complaint did not explicitly allege a violation of the right to privacy - indeed, that the word "privacy" was nowhere mentioned within the four corners of the complaint - this should end the case. This may or may not be right, but because we are not certain that the Virginia Supreme Court would categorically rule out a claim that was not explicit if it was somehow implicit in the text and because the matter can be resolved on another perfectly good reason, we refrain from deciding the matter and thus assume arguendo that an implied privacy allegation could be sufficient.

n8 We do not, however, grant this based on Resource's citation of our decision in *International Science & Technology Institute, Inc.*, 106 F.3d 1146 (4th Cir. 1997). That decision contained dictum stating that "the TCPA was enacted to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers." *Id.* at 1150 (citing S. Rep. No. 102-178, at 1 (1991)). Resource claims that this helps to prove their point that the private right of action was

passed to protect "privacy," and this citation is typical of their legislative history argument.

We pause to clarify *International Science & Technology Institute's* application in this case. Besides being pure dictum, it does not aid Resource's argument because, if anything, it only indicates that the TCPA had two broad reasons for being: (1) privacy for home-phone users, and (2) facilitation of interstate commerce for fax users. But, as we explain, St. Paul cannot get off so easily either: interstate commerce can surely be facilitated by some species of the genus "privacy" - here, the seclusion species. *See* Prosser, *infra* n. 10. This simply means that we must decide whether St. Paul's policies protect liability arising from violations of "seclusion" privacy. *See American States*, 392 F.3d at 942.

n9 This is no new revelation. The path-breaking scholarship on "privacy" in the law was written well over a hundred years ago by Samuel D. Warren and Justice Brandeis, *see The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) (collecting cases in which relief had been afforded on the basis of, e.g., defamation, a breach of confidence, or the invasion of some property right and grouping them together as a "right to privacy"). These disparate strands were carefully teased out, defined, and clarified by Dean Prosser some 45 years ago. *See* William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960). Prosser found four separate privacy-related torts: "1. Intrusion on the plaintiff's seclusion or solitude, or into his private affairs. 2. Public disclosure of embarrassing private facts about the plaintiff. 3. Publicity which places the plaintiff in a false light in the public eye. 4. Appropriation, for the defendant's

advantage, of the plaintiff's name or likeness." *Id.* at 389. For a more recent treatment, see, e.g., Jerry Kang, *Privacy in Cyberspace*, 50 Stan. L. Rev. 1193, 1202-04 (1998) (finding three distinct categories of privacy interests: (1) physical space, such as that violated by trespass and unwarranted search and seizure; (2) decisional privacy, as discussed in *Roe v. Wade*; and (3) informational privacy, or "control over the processing - i.e., the acquisition, disclosure, and use - of personal information.").

n10 St. Paul also makes the argument that "person" here means "human" person, not "legal" person or "organization" (which would include a LLP). St. Paul Br. at 29-34. St. Paul puts too fine a point on things here. But more fundamentally, as Resource argues, since this is a class-action complaint with unnamed parties, it is fair to assume that at least some of class members could be "persons" even in the restrictive sense that St. Paul suggests.

CIVIL ACTION NO: 2:03cv764

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
NORFOLK DIVISION

RESOURCE BANKSHARES CORP. et al.,
PLAINTIFFS,

v.

ST. PAUL MERCURY INSURANCE COMPANY,
DEFENDANT.

July 1, 2004, Decided
July 1, 2004, Opinion Filed

COUNSEL: For Plaintiff: W. Edgar Spivey, Esquire, R. Johan Conrod, Jr., Esquire, Kaufman & Canoles, P.C., Norfolk, VA.

For Defendant: Alan B. Rashkind, Esquire, Furniss, Davis, Rashkind & Saunders, P.C., Norfolk, VA.

For Defendant: Charles E. Spevacek, Esquire, Meagher & Geer, P.L.L.P., Minneapolis, MN.

JUDGES: Henry Coke Morgan, Jr., Senior United States District Judge.

OPINIONBY: Henry Coke Morgan, Jr.

OPINION:

ORDER

This matter arises from a claim by Plaintiffs Resource Bankshares Corporation and Resource Bank (collectively "Resource") that Defendant St. Paul Mercury Life Insurance Company ("St. Paul") wrongfully denied Resource's request for defense and indemnification pursuant to its commercial general liability (CGL) insurance policy. The motions before the Court are Resource's Motion for Partial Summary Judgment (Document No. 8), seeking a declaration that St. Paul should have defended and indemnified it for requested claims, and St. Paul's Motion for Summary Judgment (Document No. 10), seeking a dismissal on the basis that it did not have a duty to defend or indemnify Resource. The Court held a hearing on these motions on May 17, 2004. For the reasons stated in this Order, the Court **GRANTS** Resource's Motion for Partial Summary Judgment in part, **DENIES** Resource's motion in part, and **TAKES UNDER ADVISEMENT** the remainder of the motion. The Court **DENIES** St. Paul's Motion for Summary Judgment in Part, **GRANTS** St. Paul's motion in part, and **TAKES UNDER ADVISEMENT** the remaining issue of the motion.

1. RELEVANT BACKGROUND

A. FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

On January 31, 1998, 1999, 2000, 2001, and 2002, St. Paul issued to Resource an insurance policy ("the Policy(ies)") which incorporated a Commercial General Liability Protecting Insuring Agreement Form and an Umbrella Excess Liability Protection Insuring Agreement Form. (Compl. at PP 6-9, 11). On or about

March 8, 2002, a class action suit was filed against Resource in Marion County, Indiana ("Indiana Litigation") alleging violations of the *Telephone Consumer Protection Act ("TCPA")*, specifically alleging that Resource "blast-faxed" unsolicited mortgage advertisements to customers between March 1998 through March 2002. (Compl. at P 12).

Upon being served with the suit, Resource notified St. Paul of the Indiana Litigation and requested that it provide a defense and indemnify Resource. (Compl. at P 13). On or about June 4, 2002, St. Paul denied coverage, stating that the Policies did not cover the claims made in the Indiana Litigation. (Compl.. at P 14). On or about August 7, 2002, a United States District Court for the Middle District of North Carolina issued a summary judgment decision in the case of *Prime TV, LLC v. Travelers Ins. Co. 223 F. Supp. 2d 744 (M.D. N.C. 2002)*, in which it held that materially identical insurance policy terms to the terms in the Policies issued by St. Paul covered the same claims in a lawsuit alleging "blast faxing" in violation of the TCPA. (Compl. at P 15). On June 12, 2003, Resource notified St. Paul of this development and asked for reconsideration, but St. Paul again denied Resource's request for indemnification and defense. (Compl. at PP 16-17).

On November 4, 2003, Resource filed its Complaint against St. Paul in this action and makes three claims: (1) declaratory judgment from the Court that the Policies afford coverage for the claims made in the Indiana Litigation, and an Order directing St. Paul to honor the terms of the Policies by providing Resource a defense in the Indiana Litigation, indemnifying Resource for any judgment(s) entered in the Indiana Litigation, and reimbursing Resource for all costs,

expenses, and attorneys fees incurred in the Indiana Litigation; (2) breach of contract - i.e., St. Paul breached the terms of the Policies by refusing to provide a defense for Resource in the Indiana litigation and by denying coverage for the claims made; and (3) breach of contract seeking attorneys fees - based on St. Paul's alleged bad faith in denying coverage, pursuant to *Va. Code Ann. § 38.2-209.*

On March 4, 2004, Resource filed a Motion for Partial Summary Judgment. (Document No. 8). On March 15, 2004, St. Paul filed a Motion for Summary Judgment. (Document No. 10) On May 17, 2004, the Court heard argument on these motions.

B. POLICY TERMS AND INDIANA COMPLAINT ALLEGATIONS

The terms of the Policies and the allegations of the underlying complaint in the Indiana Litigation are critical to the motions because Resource's claims focus on both St. Paul's duty to defend and its duty to indemnify. The parties disagree over whether two of the Policy's provisions, "Advertising Injury Liability" and "Property Damage," afford Resource a defense and indemnification for the events underlying the Indiana Litigation. The Policy provides coverage for "advertising injury liability" as follows:

> *Advertising* means attracting the attention of others by any means for the purpose of seeking customers or increasing sales or business.
>
> ...

Advertising injury liability. We'll pay amounts any protected person is legally required to pay as damages for covered advertising injury that:

. results from the advertising of your products, work, or completed work; and
. is caused by an advertising injury offense committed while this agreement is in effect

Advertising injury means injury, other than bodily injury or personal injury, that's caused by an advertising injury offense.

Advertising injury offense means any of the following offenses:

. Libel or slander

. Making known to any person or organization written or spoken material that disparages the products, work, or completed work of others.

. Making known to any person or organization written or spoken material that violates a person's right of privacy.

. Unauthorized use of any advertising idea, material, slogan, style, or title of others in your advertising

See Document No. 9, Mem. in Supp. of Mot. for Partial Summ. J. ("Partial SJ Memo"), Ex. 1 at 2-3. The Policy also covers "property damage":

> **Bodily injury and property damage liability.** We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury or property damage that:
>
> . happens while this agreement is in effect; and
> . is caused by an event.
>
> ...
>
> *Property damage means:*
>
> . physical damage to tangible property of others, including all resulting loss of use of that property; or
>
> . loss of use of tangible property of others that isn't physically damaged.

See Partial SJ Memo, Ex. 1 at 1-2.

Also important to the analysis are the allegations found in the complaint in the Indiana Litigation ("Indiana Complaint"). The relevant sections include:

> Congress further noted that fax advertisers took advantage of fax machines by sending advertisements to available fax numbers, knowing the fax would be received and printed by the recipient's machine.

Congress found this practice problematic for two (2) reasons: (i) it shifts some of the costs of advertising from the sender to the recipient; and (ii) it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk faxes. (Indiana Complaint at P 4).

***

On February 17, 2002, Defendants transmitted by telephone facsimile machine (as defined at *47 U.S.C. § 227(a)(2)*) material advertising the commercial availability and quality of property, goods, and services to a facsimile machine owned by Cohen & Malad ... (Indiana Complaint at P 18).

***

Cohen & Malad received this facsimile without giving Defendants its prior express invitation or permission to receive such advertising materials, making it a an (sic) unsolicited advertisement, as defined by *47 U.S.C. § 227(a)(4)*. (Indiana Complaint at P 19).

The TCPA prohibits the facsimile transmission of such unsolicited advertisements, providing: "It shall be unlawful for any person in the United States ... to use any telephone facsimile machine ... to send an unsolicited advertisement to a

telephone facsimile machine ...." *47 U.S.C. § 227(b)(1)(C)*. (Indiana Complaint at P 20).

***

In the last four years, Defendants have sent similar unsolicited advertisements via facsimile to other individuals and businesses throughout the State of Indiana and the United States. (Indiana Complaint at P 22).

II. APPLICABLE LAW

A. SUMMARY JUDGMENT STANDARD

Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *FED. R. CIV. P. 56(c)*; see also *Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir. 1990)*. The facts and inferences drawn from the pleadings must be viewed in the light most favorable to the nonmoving party. *Nguyen v. CNA Corp., 44 F.3d 234, 237 (4th Cir. 1995)*. Summary judgment is appropriate when the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-49, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. If the plaintiff and defendant dispute the facts of the case, "plaintiff's version of the facts must be presented where the parties' versions conflict, at least to the degree that her allegations have support in affidavits, depositions or other documentary evidence." *Magnuson v. Peak Technical Servs., 808 F. Supp. 500, 504 (E.D. Va. 1992)* (citations omitted).

In order to successfully defeat a motion for summary judgment, a nonmoving party cannot rely on "mere belief or conjecture, or the allegations and denials contained in the pleadings." *Doyle v. Sentry Ins., 877 F. Supp. 1002, 1005 (E.D. Va. 1995)* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)).* Rather, the nonmoving party must set forth specific facts through affidavits, depositions, interrogatories, or other evidence to show genuine issues for trial. *Celotex, 477 U.S. at 324.* When the nonmoving party fails to make a sufficient showing establishing an essential element of his case and he bears the burden of proof on that issue, "there is 'no genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id. at 322; Anderson, 477 U.S. at 254.*

B. DUTY TO DEFEND

This action was filed in the Eastern District of Virginia, and Virginia's choice-of-law rules govern what substantive law applies to the insurance Policy in question. *Am. Online, Inc. v. St. Paul Mercury Ins. Co., 347 F.3d 89, 92 (4th Cir. 2003).* Virginia substantive law applies to this action because the insurance contract in this case was formed in Virginia. *Id. at 92-93* (citing *Buchanan v. Doe, 246 Va. 67, 431 S.E.2d 289, 291, 9 Va. Law Rep. 1446 (Va. 1993)).* The issue before the Court is whether the Policy covers Resource's alleged violation of the TCPA as stated by Cohen & Malad in the Indiana Complaint. To decide this issue, the Court must construe the CGL Policy. A motion for summary judgment requiring interpretation of an insurance policy is proper "because the construction of insurance contracts is a legal question well suited for resolution

by the court." *St. Paul Fire & Marine Ins. Co. v. Jacobson, 826 F. Supp. 155, 157* (citing *John Deere Ins. Co. v. Shamrock Indus. Inc., 929 F.2d 413, 417 (8th Cir. 1991)).*

"Under Virginia law, an insurer's obligation to defend an action 'depends on comparison of the policy language with the underlying complaint to determine whether any claims alleged [in the complaint] are covered by the policy." *Am. Online, Inc., 347 F.3d at 93* (quoting *Superperformance Int'l, Inc. v. Harford Cas. Ins. Co., 332 F.3d 215, 220 (4th Cir. 2003)).* Some courts have labeled this analysis the "eight corners rule" - analyzing the four corners of both the insurance policy and underlying complaint. *Erie Ins. Exch. v. State Farm Mut. Auto Ins. Co., 60 Va. Cir. 418, 423 (Va. Cir. 2002).* "Therefore, the court must decide whether to grant summary judgment by looking at the four corners of the Policy and the ... complaint[]." *Superperformance Int'l, Inc., 203 F. Supp. 2d 587, 592 (D. Va. 2002).* "'The obligation to defend is broader than [the] obligation to pay, and arises whenever the complaint alleges facts and circumstances, some of which would, if proved, fall within the risk covered by the policy.'" *Virginia Elec. & Power Co. v. Northbrook Prop. & Cas. Ins. Co., 252 Va. 265, 475 S.E.2d 264, 265 (Va. 1996)* (quoting *Lerner v. General Ins. Co., 219 Va. 101, 245 S.E.2d 249, 251 (Va. 1978)).*

In Virginia, insurance policies are "contracts whose terms are construed in accordance with the general principles applicable to all contracts." *Dairyland Ins. Co. v. Douthat, 248 Va. 627, 449 S.E. 2d 799, 801 (Va. 1994).* Thus, the clear and unambiguous language of a contract governs its meaning. See *Partnership Umbrella. Inc. v. Federal Ins. Co., 260 Va. 123, 530 S.E.*

2d 154, 160 (Va. 2000) ("when the language in an insurance policy is clear and unambiguous, courts do not employ rules of construction; rather, they give the language its plain and ordinary meaning and enforce the policy as written."). "Where there is ambiguity in the terms of an insurance policy, they should be liberally construed in favor of the insured and against the drafter of the policy; but this does not mean that a strained or unjustified construction of the policy is to be adopted, which disregards the plain meaning and intent of the parties ...." *First Am. Title Ins. Co. v. Seaboard Sav. & Loan Ass'n, 227 Va. 379, 315 S.E.2d 842, 845 (Va. 1984)* (quoting *Quesenberry v. Nichols & Erie, 208 Va. 667, 159 S.E.2d 636, 640 (Va. 1968))*. Moreover, a contract is not ambiguous merely because parties disagree as to the meaning of the terms used. *Eure v. Norfolk Shipbuilding & Drydock Corp., 263 Va. 624, 561 S.E.2d 663, 668 (Va. 2002)*.

When deciding a coverage dispute, courts should construe the terms of the policy in light of its subject matter, and the policy's words and phrases "should be given their natural and ordinary meaning as understood in the business world." *Solers, Inc. v. Hartford Cas. Ins. Co., 146 F. Supp. 2d 785, 789 (E.D. Va. 2001)*. Moreover, the contract should be read "as a single document, the meaning of which is gathered from all its associated parts when assembled as the unitary expression of the agreement of the parties." *First Am. Title Ins. Co., 315 S.E.2d at 845*. Taking into account all of these principles of contract interpretation, "the insurer is relieved of a duty to defend only when it clearly appears from the initial pleading the insurer would not be liable under the policy contract for any judgment based upon the

allegations." *Reisen v. Aetna Life & Cas. Co., 225 Va. 327, 302 S.E.2d 529, 531 (Va. 1983).*

III. ANALYSIS

A. ADVERTISING INJURY

The first issue before the Court is Resource's claim that the Policy provisions covering "Advertising Injury" cover the TCPA claims made by Cohen & Malad in the Indiana Litigation. St. Paul does not contest that the facsimile attached to the Indiana Complaint "advertised" Resource's "products" and/or "work." Thus, the inquiry becomes whether Resource's alleged violation of the TCPA, found in the Indiana Complaint, constitutes an "advertising injury offense." The Policy states:

> *Advertising* means attracting the attention of others by any means for the purpose of seeking customers or increasing sales or business.
>
> ...

Advertising injury offense means any of the following offenses:

> . Libel or slander
>
> . Making known to any person or organization written or spoken material that disparages the products, work, or completed work of others.

> . Making known to any person or organization written or spoken material that violates a person's right of privacy.
>
> . Unauthorized use of any advertising idea, material, slogan, style, or title of others in your advertising

See Partial SJ Memo, Ex. 1 at 3 (emphasis added).

Resource contends that the Policy's Advertising Injury provisions cover the TCPA claims made in the Indiana Complaint. In support of its position, Resource relies heavily on the legislative history and executive signing statement of the TCPA. In Intl. Sci. & Tech. Inst. v. Inacom Communs., Inc., the Fourth Circuit explained: "The TCPA was enacted to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers." *106 F.3d 1146, 1150 (4th Cir. 1997)* (citation omitted). In enacting the TCPA, Congress found that, "unrestricted telemarketing ... can be an intrusive invasion of privacy." *TIG Ins. Co. v. Dallas Basketball, Ltd., No. 05-03-00134-CV, 2004 Tex. App. LEXIS 1243, (Tex. Ct. App. Feb. 11, 2004)* (quoting H.R. Rep. No. 102-317 at 2 (1991)).

Additionally, Resource relies on nine decisions dating back to August 2002, in which courts have found that (i) the TCPA exists to protect privacy interests, and thus (ii) claims alleging violations of its provisions by sending unsolicited facsimiles trigger coverage that is available for invasions of the right to privacy. See,

e.g., *Park Univ. Enterprises, Inc. v. Am. Cas. Co. of Reading, PA, 314 F. Supp. 2d 1094, 2004 WL 834176 (D. Kan. Apr. 15, 2004)*; *Registry Dallas Assocs. v. Wausau Bus. Ins. Co., 2004 U.S. Dist. LEXIS 5771, 2004 WL 614836 (N.D. Tex. Feb. 26, 2004)*; *TIG Ins. Co. v. Dallas Basketball Ltd.*; *Universal Underwriter's Ins. Co. v. Lou Fusz Auto. Network, Inc., No. 4: 300 F. Supp. 2d 888, 02CV1647CDP, 2004 WL 117508 (E.D. Mo. Jan. 21, 2004)*; *Am. States Ins. Co. v. Capital Assocs. of Jackson County, Inc., 2003 U.S. Dist. LEXIS 25532, Docket No. 02-00975-DRH (S.D. Ill. Dec. 9, 2003)*; *Hooters of Augusta, Inc. v. Am. Global Ins. Co., 272 F. Supp. 2d 1365 (S.D. Ga. 2003)*; *W. Rim Inv. Advisors, Inc. v. Gulf Ins. Co., 269 F. Supp. 2d 836 (N.D. Tex. 2003)*; *Merchant's & Businessmen's Mut. Ins. Co. v. A.P.O. Health Co., Inc., 228 N.Y. L.J. 22* (N.Y. Sup. Ct. Aug. 29, 2002); *Prime TV, LLC v. Travelers Ins. Co., 223 F. Supp. 2d 744 (M.D.N.C. 2002)*.

Resource claims that Prime TV, LLC is illustrative of the cases deciding the issues before the Court. The insured was sued for allegedly violating the TCPA after it faxed an advertisement to millions of potential customers. *Prime TV, LLC, 223 F. Supp. 2d at 747*. The district court held that the insured's actions caused an advertising injury as defined by the insurer's policies, and further, "the underlying actions seek redress for the invasion of privacy rights (as well as the loss of use of property) under the TCPA." *Id. at 752*. In making its decision, the District Court also relied upon the Fourth Circuit's quotation of legislative history in *Intl. Sci. & Tech. Inst., Inc., 106 F.3d 1146, 1150 (4th Cir. 1997)*. *Id. at 753*.

In response to Resource's claims, St. Paul attempts to distinguish the case at bar from the prior decisions

when courts were faced with insurance coverage issues involving underlying TCPA claims. First, St. Paul contends that the other decisions involved different policy language than the Policy language relevant in the case at bar. More importantly, St. Paul argues that prior court decisions "have been superficial in their analysis." See Def.'s Mem. in Opp'n to Pl's Mot. for Partial Summ. J. at 4.

St. Paul first argues that the Indiana Complaint does not allege a privacy claim, and thus, applying the eight-corners rule, there is no coverage under the Policy. The Court is persuaded that the Indiana Complaint does allege a privacy claim when it alleges a violation of the TCPA. The Indiana Complaint contains several references to the TCPA, see Indiana Complaint at PP 2-3, 16(iii), and Congress' intention for the TCPA to prohibit unsolicited faxes and advertisements. Id. at PP 2, 19-20. The Indiana Complaint further alleges that Cohen & Malad, and other individuals and businesses, received these unsolicited facsimile advertisements in violation of the TCPA. Id. at PP 1, 19-20, 22. In light of the Fourth Circuit's clear statement in Intl. Sci. & Tech. Inst., Inc. that the purpose of the TCPA was to protect privacy interests, the allegations in the Indiana Complaint assert a privacy claim against Resource. *106 F.3d 1146, 1150* ("The TCPA was enacted to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers.").

Next, St. Paul asserts that Cohen & Malad failed to allege that Resource "made known to any person or organization oral or written material," as required by

the Policy. More specifically, St. Paul argues that Resource never made known information about Cohen & Malad to any third-party. St. Paul maintains that the language and structure of the policy require that the material be made known to a third person, a person other than the one whose privacy has allegedly been violated. The Court disagrees with St. Paul's reading of the Policy. A plain reading of the Policy requires that the making known be made to *any* person, not necessarily a third-party. In this case, Resource made known to Cohen & Malad, information about its business.

St. Paul's "making known to a third person" argument assumes that only actions constituting the tort of "invasion of privacy" violate a "person's right of privacy" as covered by the Policy. See *MGM Inc. v. Liberty Mut. Ins. Co., 253 Kan. 198, 855 P.2d 77 (Kan. 1993)* (holding that there was no publication in violation of an individual's right to privacy when the content of recorded telephone calls was not disclosed to others); *State Farm Fire & Cas. Co. v. Compupay, 654 So.2d 944 (Fla. Ct. App. 1995)* (in order to invoke coverage, claims involving invasion of privacy require allegations and proof of publication to a third person). However, "invasion of privacy" is a legal term of art. The phrase "invasion of privacy" is not used in the advertising injury section of the Policy and the Policy's "right of privacy" is not defined narrowly to include only actions which might constitute the tort of invasion of privacy. For these reasons, the Court rejects St. Paul's claim that information must be made known to a third person.

St. Paul next claims that the Indiana Complaint fails to allege an advertising injury because it is the content of the advertisement, not the advertisement itself, must

violate a person's right to privacy for coverage to exist. This exact position was considered and rejected by the courts in Western Rim, TIG Ins. Co., Park Univ. Enterprises, Inc., and Registry Dallas Assocs., L.P. In Western Rim, the Court agreed with the insured "that the *unwanted advertisement*, regardless of what it specifically advertises, is the *material* that is offensive and violative of their right of privacy." *269 F. Supp. 2d at 847* (emphasis in original). The Western Rim court based its decision on Congress' intent to protect individuals from receiving unsolicited faxed advertisements. Id. The Texas Court of Appeals reached a similar conclusion in TIG Ins. Co., where the court concluded, "But for the fact that the transmission contained advertising, the plaintiffs would not have been able to make claims under the Act ... [which] presumes all advertising, so long as it is unsolicited, is an offensive intrusion into the recipient's solitude." *TIG Ins. Co., 2004 Tex. App. LEXIS 1243, * 11*; see also *Park Univ. Enterprises, Inc., 314 F. Supp. 2d 1094, [WL] at *11-12* (finding that all advertising via unsolicited facsimile constitutes "material"); *Registry Dallas Assocs., L.P., 2004 U.S. Dist. LEXIS 5771, [WL] at *6* (same). In the case at bar, the "material" in question is the advertisement that Resource sent to Cohen & Malad via facsimile.

St. Paul's final argument with respect to the advertising injury provisions is that Cohen & Malad, as a limited liability partnership, cannot assert a violation of a "person's" right of privacy. The Policy provides coverage for "making known to any *person* or *organization* written or spoken material that violates a *person's* right of privacy." (emphasis added). To the Court's knowledge, this is the first case involving a

coverage dispute under the TCPA in which "person" must be interpreted in relation to "organization." St. Paul concedes that the Policy does not define "person"; however, St. Paul argues that it is clear in reading the Policy as a whole that "person" and "organization" are two separate and distinct terms, with the term "organization" referring to legal entities such as partnerships and corporations, including Cohen & Malad.

The Court is not persuaded by St. Paul's argument on this issue. Because "person" is not defined by the Policy, there are multiple interpretations of the Policy language cited by St. Paul. One interpretation is that offered by St. Paul - i.e., "person" describes natural persons, while "organization" describes legal entities such as limited liability corporations. An alternative, and equally plausible interpretation, is one that defines "person" to include all persons with legal rights - including natural persons and corporate entities organized under the law - and "organization" to include entities not organized under the law and without legal rights such as unincorporated associations. Despite St. Paul's argument to the contrary, the Policy language is ambiguous. Under Virginia law, "where there is ambiguity in the terms of an insurance policy, they should be liberally construed in favor of the insured and against the drafter of the policy ...." *First Am. Title Ins. Co., 315 S.E.2d at 845* (quoting *Quisenberry, 159 S.E.2d at 640*). This is consistent with the decision in Hooters of Augusta, Inc., where the district court found that the policy's undefined term "person" was ambiguous. *272 F. Supp. 2d 1365, 1374, n. 7* ("... the term 'person' in the policy is ambiguous. In Georgia, for instance, the term 'person' includes a corporation." (citing *O.C.G.A. § 1-3-*

3(14) (Supp. 2000)). The Court agrees with the Hooters of Augusta, Inc. court that "person" is ambiguous, even when used in a Policy provision also containing "organization." The Court must give the Policy's words "their natural and ordinary meaning as understood in the business world," *Solers, Inc., 146 F. Supp. 2d at 789*, and thus, "person" includes natural persons and organized entities with legal rights under the law. Therefore, Cohen & Malad, a limited liability partnership organized under the laws of the State of Indiana, is a "person" within the meaning of the Policy.

For the reasons discussed here, the Court **FINDS** that Cohen & Malad alleged an "advertising injury" as defined by the Policy. The Court **GRANTS** Resource's Motion for Partial Summary Judgment as to St. Paul's duty to defend Resource in the Indiana Litigation, but **TAKES UNDER ADVISEMENT** Resource's motion as it relates to indemnification. As discussed previously, the obligation to defend is broader than the obligation to indemnify. *Virginia Elec. & Power Co., 475 S.E.2d at 265*. "The obligation to defend arises whenever the complaint against the insured alleges facts and circumstances, some of which, if proved, would fall within the risk covered by the policy." *Brenner v. Lawyers Title Ins. Corp., 240 Va. 185, 397 S.E.2d 100, 102 (Va. 1990)*. In the case at bar, St. Paul is obligated to defend Resource because Cohen & Malad's allegations fall within the Advertising Injury provision, regardless of the Court's decision as to coverage under the Property Damage provision. The Court also **DENIES** St. Paul's Cross-Motion for Summary Judgment on the issue of defense under the Advertising Injury provision, and **TAKES UNDER**

ADVISEMENT St. Paul's motion as it relates to indemnification under such coverage.

B. PROPERTY DAMAGE

In addition to its claim under the Advertising Injury provision of the Policy, Resource makes a claim for defense and coverage pursuant to the Bodily Injury and Property Damage provision of the Policy. See Partial SJ Memo, Ex. 1 at 1-3. This Policy section provides coverage for (1) physical damages to property; or (2) loss of use of tangible property that is not physically present. Partial SJ Memo, Ex. 1 at 2. The relevant policy language for property damage states:

> **Bodily injury and property damage liability.** We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury or property damage that:
>
> . happens while this agreement is in effect; and
>
> . is caused by an event.
>
> ...
>
> *Property damage means:*
>
> . physical damage to tangible property of others, including all resulting loss of use of that property; or
>
> . loss of use of tangible property of others that isn't physically damaged.

Id.

Again, Resource relies upon Prime TV, LLC, where the District Court observed that legislative history of the TCPA identified property damage as one of the problems associated with unsolicited facsimile advertising:

> First, it shifts some of the costs of advertising from the sender to the recipient. Second, it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax ... The recipient assumes both the cost associated with the use of the facsimile machine, and the cost of the expensive paper used to print out facsimile messages.

Prime TV, LLC, 223 F. Supp. 2d at 750 (quoting *Destination Ventures, Ltd. v. FCC, 844 F. Supp. 632, 636 (D. Ore. 1994)).* The Court further noted that "as a result of the Direc TV facsimiles, the recipients lost the use of their fax machines as well as permanent loss of facsimile paper and ink." *Prime TV, LLC, 223 F. Supp. 2d at 750.* The District Court's holding in Prime TV, LLC mirrors Cohen & Malad's allegations in the Indiana Complaint. Specifically, Cohen & Malad alleges:

> Congress further noted that fax advertisers took advantage of fax machines by sending advertisements to available fax numbers, knowing the fax would be received and printed by the recipient's machine. Congress found this practice problematic for

> two (2) reasons; (i) it shifts some of the costs of advertising from the sender to the recipient; and (ii) it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk faxes.

Indiana Complaint at P 4.

Resource contends that the circumstances underlying Cohen & Malad's complaint satisfy the property damage section of the Policy. First, Resource argues that Cohen & Malad alleged "property damage" in the Indiana Complaint. Under Resource's interpretation, the complaint alleges the physical damage and loss of tangible property (i.e., facsimile ink and paper), as well as loss of use of tangible property (i.e., facsimile machine while Resource's facsimile was being received). Second, Resource contends that the Indiana Complaint alleges that the "property damage" occurred as a result of an "event" - i.e., the accidental transmission of facsimiles to persons whom Resource believed had requested the faxes. In support of its position, Resource cites to Prime TV and Park Univ. Enterprises, Inc., in which both courts found negligent facsimile transmission of unsolicited advertisement to be an "occurrence" within the meaning of the policies. *Prime TV, 223 F. Supp. 2d at 751-52; Park Univ. Enterprise. Inc., 314 F. Supp. 2d 1094, 2004 U.S. Dist. LEXIS 6649 at *23.* Resource further argues that nothing in the Indiana Complaint suggests that its actions were willful or intentional, and thus, subject to exclusion under the Policy. Rather, Virginia law requires the insurer to defend "whenever the complaint against the insured alleges facts and circumstances,

some of which, if proved would fall within the risk covered by the policy." *Brenner, 397 S.E.2d at 102.* Accordingly, Resource believes that the Indiana Complaint clearly stated a claim for which St. Paul owed it a duty to defend.

The Court assumes, without deciding, that Cohen & Malad alleged "property damage" as it is defined in the Policy - e.g., loss of facsimile toner and paper, and loss of use of the facsimile machine. However, the Court does not agree with Resource's argument that the property damage alleged was caused by an "event." The Policy defines "event" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." See Partial SJ Memo, Ex. 1 at 2. Three basic principles of Virginia insurance law guide the Court in deciding the issue of whether the property damage in question was caused by an "event" (i.e., accident). First, the term "accident" refers to "an incident that was unexpected from the viewpoint of the insured." *Utica Mut. Ins. Co. v. Travelers Indem. Co., 223 Va. 145, 286 S.E.2d 225, 226 (Va. 1982).* Second, intentional acts are not "accidents," so allegations based on such conduct are not covered by an insurance policy. Id. Third, Virginia applies the Natural and Probable Consequences Test, which states that an "accident" is an "event which creates an effect which is not the natural or probable consequence of the means employed and is not intended, designed, or reasonably anticipated." *Lynchburg Foundry Co. v. Irvin, 178 Va. 265, 16 S.E.2d 646, 648 (Va. 1941).*

In the case at bar, if the alleged property damage is the loss of facsimile toner and paper and loss of use of the facsimile machine, then the transmission of the fax must be the "event" that caused the loss, if the Court is

to find coverage under the Policy. However, Resource's transmission of the facsimile to Cohen & Malad was not an "event" because it was not an accident. The facsimile transmission was not unexpected. In fact, Resource alleges that it intended to transmit the facsimile, but made a mistake by including Cohen & Malad on the recipient list prior to facsimile transmission. Resource's alleged mistake in placing Cohen & Malad on the recipient list did not cause facsimile toner and paper consumption or the loss of use of the facsimile machine. The intentional transmission of the facsimile advertisement caused this alleged property damage. Moreover, Resource cannot argue that its transmission of the facsimile was an "event which creates an effect which is not the natural or probable consequence of the means employed and is not intended, designed, or reasonably anticipated." See *Lynchburg Foundry Co., 16 S.E.2d at 648*. An entity that transmits a facsimile message to a recipient necessarily expects the recipient's machine to print the message, which involves the use of facsimile paper and toner and the temporary loss of use of the recipient's facsimile machine.

For these reasons, the Court **FINDS** that the alleged property damage was not caused by an "event" (i.e., accident), and therefore, St. Paul has no duty to defend or indemnify Resource on this basis. The Court **DENIES** Resource's Motion for Partial Summary Judgment, and **GRANTS** St. Paul's Motion for Summary Judgment, as they relate to defense and indemnification under the Policy's property damage provision.

C. BAD FAITH CLAIM

The next issue before the Court is St. Paul's Motion for Summary Judgment on Count III, which alleges Breach of Contract in Bad Faith. (Compl. at PP 26-29). Based on the evidence before the Court at this time, the Court **FINDS** that the coverage issues disputed by the parties are fairly debatable. Unless Resource can provide the Court with sufficient evidence of St. Paul's bad faith by the end of the discovery period, the Court will grant St. Paul's motion on this claim. Both parties are **ADVISED** to submit briefs on this issue within five (5) days of the discovery deadline if they wish the Court to reconsider its position. The parties may communicate, formally or informally, with the Court on that issue. The Court **TAKES UNDER ADVISEMENT** St. Paul's Motion for Summary Judgment on Count III.

D. FINAL JUDGMENT PURSUANT TO *RULE 54(b)*

The final issue before the Court is the parties' request that the Court make an express determination that there is no just reason for delay and direct entry of a final judgment in favor of Resource and against St. Paul on the issue of St. Paul's duty to defend, pursuant to *Rule 54(b) of the FEDERAL RULES OF CIVIL PROCEDURE.* It is well-settled that the Fourth Circuit disfavors certification of a judgment as to a claim or party in a multi-claim or multi-party suit. *Bell Microproducts, Inc. v. Global-Insync, Inc., 20 F. Supp. 2d 938, 942 (4th Cir. 1998).* If a district court chooses to certify a judgment as to a claim or party, it must make express findings on the record or in its order. *Id. at 943.* First, the district court must determine whether the judgment is final - i.e., whether it disposes of an individual claim in a multi-claim action. *Braswell Shipyards v. Beazer E., Inc., 2 F.3d 1331, 1335 (4th Cir.*

1993). Second, the district court must find that there is no just reason for delay. *FED. R. CIV. P. 54(b)*.

In the case at bar, the Court **FINDS** that both *Rule 54(b)* elements are satisfied. First, the Court **FINDS** that the judgment is final as to Resource's claim that St. Paul breached its duty to defend in the Indiana Litigation. The Court has determined that St. Paul owes Resource a defense based on the Advertising Injury provision of the Policy. Second, the Court **FINDS** that there is no just reason for delay. In making this finding, the Court believes that judicial economy would be served by allowing certification at this time. For example, a Circuit Court decision reversing this Court's finding of a duty to defend on the basis of the Advertising Injury provision would end this coverage case.[2] (e.g., mooting indemnification and breach of contract in bad faith). A Circuit Court decision finding that Resource is entitled to coverage under either the Advertising Injury or Property Damage provision will result in Resource being furnished a defense in the Indiana Litigation. The issue of indemnity cannot be resolved by this Court or on appeal unless and until there is a recovery by the plaintiff in the Indiana Litigation and the theory of recovery is tested against the available coverage. A finding in favor of Resource in the Indiana Litigation will moot the indemnification issue.

Accordingly, this Court **STAYS** further proceedings on the separate claims of indemnity and bad faith pending consideration of an appeal of this Order by the United States Court of Appeals for the Fourth Circuit.

IV. CONCLUSION

The Court **GRANTS** Resource's Motion for Partial Summary Judgment as to St. Paul's duty to defend Resource pursuant to the Advertising Injury coverage in the Indiana Litigation, but **TAKES UNDER ADVISEMENT** Resource's motion as it relates to indemnification under such coverage. The Court **DENIES** St. Paul's Motion for Partial Summary Judgment on the issue of defense under the Advertising Injury provision and **TAKES UNDER ADVISEMENT** St. Paul's motion as it relates to indemnification under such provision. The Court **DENIES** Resource's Motion for Partial Summary Judgment, and **GRANTS** St. Paul's Motion for Partial Summary Judgment, as these motions relate to defense and indemnification under the Policy's property damage provision. The Court **TAKES UNDER ADVISEMENT** St. Paul's Bad Faith Claim in Count III.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court **FINDS** that its rulings as to the separate duty of defense under the Policy are final and that there is no just reason for delay, and **ORDERS** that its decisions granting and denying the Cross-Motions for Summary Judgment be entered as a final judgment pursuant to Rule 54(b). The separate claims for indemnity and bad faith are **STAYED** pending consideration of an appeal of this Order by the United States Court of Appeals for the Fourth Circuit.

The Clerk is **REQUESTED** to send a copy of this order to all counsel of record and the Clerk of the Circuit Court of Appeals for the Fourth Circuit.

It is so **ORDERED.**

HENRY COKE MORGAN, JR.

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
July 1st, 2004

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 In considering a motion for summary judgment, the court must view the facts and the reasonable inferences to be drawn from those facts in the light most favorable to the party opposing the motion. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. Therefore, in considering cross motions for summary judgment, the court must consider the facts in the light most favorable to each party when considering its opposition to the motions in issue. In this proceeding, the material facts are not in dispute as to the motions decided; however, future developments could impact other rights of the parties.

n2 Unless the Court also found there was a duty to defend under the Property Damage provision.

Federal Rules of Civil Procedure Rule 56
UNITED STATES CODE ANNOTATED
FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
VII. JUDGMENT

➡Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount

of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule; an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue

for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Amendments received to 07-31-05

47 U.S.C.A. § 227

Effective: July 09, 2005

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER II--COMMON CARRIERS
PART I--COMMON CARRIER REGULATION

■§ 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section--

(1) The term "automatic telephone dialing system" means equipment which has the capacity--

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i) of this section, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that--

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a

relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States–

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice–

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless--

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through--

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited

advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines--

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if--

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes–

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d) of this section;

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if--

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only--

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such

limits, the Commission shall--

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall--

(A) compare and evaluate alternative methods and

procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding

initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall--

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under

subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall--

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of

subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State--

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States--

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that--

(A) all artificial or prerecorded telephone messages
(i) shall, at the beginning of the message, state

clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(f) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone cal. or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United

States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the

defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(g) Junk Fax Enforcement report

The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include--

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)--

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)--

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery--

(A) the number of days from the date the Commission issued such order to the date of such

referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.

Current through P.L. 109-57 approved 08-02-05

STATE OF INDIANA
COUNTY OF MARION
CASUE NO. 490070203p1000429

Cohen & Malad, LLP, on behalf of itself and all others similarly situated,
Plaintiff,

v.

Resource bankshares Corporation and Resource Bank,
Defendants.

Jury Demanded

Filed Mar 08, 2002

CLASS ACTION COMPLIANT

The Plaintiff, Cohen & Malad, LLP, on behalf.of itself and all others similarly situated, by counsel, for its Defendants, Resource Bankshares Corporation and Resource Bank, alleges and states as follows;

Background of the Case

1. This case arises as a result of Defendants' mass transmission of unsolicited facsimile advertisements to Plaintiff and Members of the putative class.

2. Defendants' transmission of these unsolicited facsimile advertisements is indirect violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. Sec. 227, which prohibits any person from using a telephone facsimile machine to send an unsolicited advertisement

to a telephone facsimile machine.

3. The current version of the TCPA, which went into effect on December 20, 1992, was enacted in response to the marked increase in telemarketing. With regard to fax advertising in particular, the United State's Congress recognized that the proliferation of facsimile machines had been accompanied by explosive growth in unsolicited facsimile advertising, of junk faxes."

4. Congress further noted that fax advertisers took advantage of fax machines by sending advertisements to available fax numbers, knowing the fax would be received and printed by the recipient's machine. Congress found this practice problematic for two(2) reasons: (i) it shifts some of the costs of advertising from the sender to the recipient; and (ii) it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk faxes.

The Parties

5. Plaintiff Cohen & Malad, LLP ("Cohen & Malad") is a limited liability partnership organized under the laws of Indiana, with its principal place of business located in Marion County, Indiana.

6. Defendant Resource Bankshares Corporation is a Virginia Corporation with its principal place of business located in Virginia Beach, Virginia. Resource Bankshares Corporation is not registered with the Indiana Secretary of State. Resource Bankshares Corporation, is jointly and severally liable for Resource bank's violations of the TCPA pursuant to the doctrine

of respondeat superior.

7. Defendant Resource bank is a Virginia Corporation with its principal place of business located in Virginia beach, Virginia. Resource Bank is not registered with the Indiana Secretary of State. At all times relevant to this Complaint, Resource Bank was an agent of Resource Bankshares Corporation. (Resource Bankshares Corporation and Resource bank are collectively referred to herein as "Defendants"

Jurisdiction and Venue

8. Defendants are engaged in business in the State of Indiana, and have supplied and/or contracted to supply services rendered or to be rendered and/or goods or materials furnished or to be furnished within this State. This Court has jurisdiction over Defendants pursuant to Indiana Trial Rules 4.4(A)(1) and (4).

9. Pursuant to Trial Rule 75(A)(10), venue is proper in Marion County, as the Plaintiff's principal office is located in Marion County.

10. Pursuant to 47 U.S.C. Sec. 227(b)(3), as unanimously interpreted by courts throughout the country, state courts have exclusive jurisdiction over private rights of action under the TCPA.[1]

Plaintiff's Class Action Allegations

11. The Plaintiff brings this action pursuant to Indiana Trial Rule 23 on behalf of itself and all others similarly situated as members of the following proposed Plaintiff Class:

All persons or entities in the United States who received facsimile transmissions from Resource bank during the period of March 8, 1998 to March 8, 2002 which contained any material advertising the commercial availability or quality of any property, goods or services without that person's or entity's prior expressed invitation or permission.

(hereinafter referred to as the "Class").

12. The members of the Class are so numerous that the individual joinder of all members is impracticable. Although the exact number is unknown, there are at least forty (40) Class members in the proposed Class.

13. There are questions of law and fact common to all members of the Class, and these common questions predominate over any questions affecting individual Class members.

14. The Plaintiff's claims are typical of the claims of the Class. Plaintiff is a member of the Class and has been injured by the same course of conduct of Defendants that has damaged the other members of the Class.

15. The Plaintiff will fairly, fully, and adequately protect the interests of the Class, and has retained experienced and competent counsel. Plaintiff has no interests that conflict with, or are adverse to those of the Class.

16. Questions of law or fact common to the members of the Plaintiff Class predominate over any questions affecting only individual members, such that a class action is superior to other available methods for the fair

and efficient adjudication of this controversy. Common questions of law and fact applicable to the Plaintiff and the Plaintiff Class include, but are not limited to, the following:

(i) Whether Resource bank transmitted advertisement facsimiles to numerous persons or entities;

(ii) Whether recipients of advertisement faxes gave Resource Bank permission to receive such faxes;

(iii) Whether Resource Bank's facsimile transmission violated the provisions of 47 U.S.C. Sec. 227.

(iv) Whether Resource Bankshares Corporation is liable to the Plaintiff and the Class for violations of the TCPA by Resource bank pursuant to the the doctrine of respondeat superior; and

(v) The amount of damages for which Defendants are liable for their repeated violations of the TCPA.

17. There will be no unusual difficulty in the management of this litigation as a class action.

Claim for Violations of the TCPA

18. On February 17, 2002, Defendants transmitted by telephone facsimile machine (as defined at 47 U.S.C. Sec. 227(a)(2)) material advertising the commercial availability and quality of property, goods, and services to a facsimile machine owned by Cohen & Malad. A copy of that facsimile is attached hereto and marked as Exhibit "B".

19. Cohen & Malad received this facsimile without giving Defendants its prior express invitation or permission to receive such advertising materials, making it a an unsolicited advertisement, as defined by 47 U.S.C. Sec. 227(a)(4).

20. The TCPA prohibits the facsimile transmission of such unsolicited advertisements, providing: "It shall be unlawful for any person in the United States...to use any telephone facsimile machine...to send an unsolicited advertisement to a telephone facsimile machine..." 47 U.S.C. Sec. 227(b)(1)(C).

21. The TCPA creates a cause of action for violations such as Defendants'. Specifically, 47 U.S.C. Sec. 227(b)(3) provides, in relevant part, as follows:

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State –

(A) An action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) An action to recover for actual monetary loss from such a violation, or to receive Five Hundred Dollars ($500.00) in damages for each such violation, whichever is greater, or

(C) Both such actions.

22. In the last four years, Defendants have sent similar unsolicited advertisements via facsimile to other individuals and businesses throughout the State of

Indiana and the United States.

WHEREFORE, the Plaintiff, on behalf of itself and the Plaintiff Class, prays for the following:

(a) Certification of a Plaintiff as defined herein;
(b) Entry of a judgment against Defendants for their violations of the TCPA;
(c) An award to Plaintiff and the Class members of actual monetary loss from such violations, or the sum of Five Hundred Dollars ($500.00) in damages for each unsolicited facsimile sent by Defendants, whichever is greater;
(d) All other relief just and proper in the premises.

Respectfully submitted,

Young & Young

By: s/
James H. Young.

Jury Demand

The Plaintiff, Cohen & Malad, LLP, on behalf of itself and all others similarly situated, by counsel, respectfully demands a trial by jury in this matter.

Dated 3/8/02

Respectfully submitted,

Young & Young

By: s/
James H. Young.

Footnotes

[1] See, International Science & Tech. Institute, Inc. v. Inacom Comm., Inc., 106 F. 3d 1146 (4th Cir. 1997); Murphey v. Lanier, 204 F. 3d 911, 915 (9th Cir. 2000); ErieNet, Inc. v. Velocity Net, Inc., 156 F. 3d 513, 520 (3rd Cir. 1998); Foxhall Realty Law Offices, Inc. v. Telecom. Premium Servs., Ltd., 156 F. 3d 432, 438 (2nd Cir. 1998); Nicholson v. Hooters of Augusta, Inc., 136 F. 3d 1287, 1289, modified, 140 F. 3d 989 (11th Cir. 1998); Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507, 514 (5th Cir. 1997). Although Judge Barker of the United States District Court for the Southern District of Indiana, Indianapolis Division, held, at a time when there were virtually no published opinions on the issue, that federal courts had subject matter jurisdiction over private TCPA claims in Kenro, Inc. v. Fax Daily, Inc., 904 F. Supp. 912 (S.D. Ind. 1995), on reconsideration, 962 F. Supp. 1162 (S.D. Ind. 1997), she recently reversed her position in light of the unanimous subsequent rulings by six federal circuits of appeals. Cohen & Malad, P.C. v. USMoney Source, Inc., IP-00-1547-C-B/S (S.D.Ind.)(remanding a private TCPA action to state court due to lack of federal subject matter jurisdiction, and adopting and incorporating the logic of the six circuit courts of appeals cited above)(A copy of Judge barker's Order Granting plaintiff's Motion to Remand is attached hereto as Exhibit "A").

Exhibit

Resource Bank

HOME EOUITY DIVISION
2002

Looking to bridge a relationship!
Start with us & end with us!

- 100% Stated Income 1st/2nd Combo with 620 Score
- 100% LTV 1st Down to 580 Score (No Mortgage Insurance)
- 90% LTV 1st Down to 560 Score (No Mortgage Insurance)
- 100% LTV on Rural Properties to 580 Score (No MI)
- 95% 1st/2nd Combo NINA with 620 Score
- 100% 1st/2nd Non-Owner Combo with 680 Score
- 103% LTV 1st Down to 580 Score (No Mortgage Insurance)
- Stated Stand Alone 2nd Refi up to 95%
- 100% CLTV stated Value 2nd
- 125% CLTV 2nds

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP 00-1547-C-B/S

COHEN & MALAD, P.C., on behalf of itself and all others similarly situated,,
Plaintiff,

vs.

USMONEY SOURCE, INC. d/b/a SOLUNAFIRST,
Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

We have been asked by Plaintiff to remand this cause to state court, thereby yielding to the rulings of six federal courts of appeals, all of which unanimously have adopted a view opposite to that which were reached in a similar case, when we addressed the issue as a matter of first impression under the then newly-enacted federal statute. Our decisions was explicated in Kenro, Inc. v. Fax Daily, Inc. 904 F. Supp. 912 (S.D. Ind. 1995) and further explicated in response to a request for reconsideration, at 962 F. Supp. 1162 (S.D. Ind. 1997). The issue presents itself again here, the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. Sec. 227, providing in applicable part as follows:

A person or entity may, if otherwise permitted by the

laws or rules of court of a State, bring in an appropriate court of that State-

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
(B) (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
(C) both such actions.

47 U.S.C. Sec. 227(b)(3) (emphasis added)

The parties here, as was true in the Kenro cases, dispute whether this statutory language grants state courts exclusive jurisdiction to hear private actions. In Kenro, we held that the statute created concurrent federal and state jurisdiction, when considered in light of 28 U.S.C. Sec. 1331. Since the time of our decisions in Kenro, six courts of appeals[1] have held to the contrary , finding that there is exclusive state jurisdiction. Though our decision in Kenro was not appealed (and thus not reversed) and though the Seventh Circuit has not itself addressed this particular issue in any published decision, we nonetheless feel constrained at this juncture to acknowledge the surging tide and the near deafening roar of these appellate decisions on this issue and to yield to their shared wisdom and distilled judgment.

We will not belabor our discussion here by a detailed repetition of the analyses utilized by the courts of appeals; we will simply state that we adopt and incorporate their logic and accept their uniform

conclusion that the TCPA confers exclusive jurisdiction upon state courts to hear and decide private actions such as Plaintiff's. Plaintiff's motion to remand is thus Granted. However because Defendant's removal of this case was premised on clear authority from this very court, we cannot say that their action warrants an imposition of an award of attorneys fees and costs in favor Plaintiff and against Defendant. The request by Plaintiff for fees and costs is thus Denied.

The Clerk of Court is directed to remand this action forthwith to the Marion Superior Court, at Indianapolis, Indiana, Civil Division, Room No. 12. the judge of that court can determine whether the cause should resume under its previous cause number (49D03-0009-CP-001349) or whether it should be assigned a new number.

It is so Ordered this 12th day of December 2000.

s/
Sarah Evans Barker, Chief Judge
United States District Court
Southern District of Indiana

Footnote

[1] The Fourth Circuit in International Science & Tech. Institute, Inc. v. Inacom Comm., Inc., 106 F.3d 1146 (4th Cir. 1997); the Fifth Circuit in Chair King, Inc. v. Houston Cellular Corp., 131 F. 3d 507 (5th Cir. 1997); the Eleventh Circuit in Nicholson v. Hooters of Augusta, Inc., 136 F. 3d 1287, modified 140 F. 3d 989 (11th Cir. 1998); the Second Circuit in Foxhall Realty Law Offices, Inc. v. Telecom. Premium Servs., Ltd., 156 F.

3d 432 (2nd Cir. 1998); and the Ninth Circuit in Murphey v. Lanier, 204 F. 3d 911 (9th Cir. 2000).

No. 04-1946, No. 03-764

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESOURCE BANKSHARES CORPORATION;
RESOURCE BANK,
Plaintiffs-Appellees,

v.

ST. PAUL MERCURY INSURANCE COMPANY,
Defendant-Appellant.

AMERICAN CASUALTY COMPANY OF
READING, PENNSYLVANIA; ERIE INSURANCE
COMPANY; FEDERAL INSURANCE
CORPORATION; GREAT NORTHERN
INSURANCE COMPANY,
Amici Supporting Appellant.

No. 04-1962, No. 03-764

RESOURCE BANKSHARES CORPORATION;
RESOURCE BANK,
Plaintiffs-Appellants,

v.

ST. PAUL MERCURY INSURANCE COMPANY,
Defendant-Appellee.

AMERICAN CASUALTY COMPANY OF
READING, PENNSYLVANIA; ERIE INSURANCE
COMPANY; FEDERAL INSURANCE

CORPORATION; GREAT NORTHERN INSURANCE COMPANY,
Amici Supporting Appellee.

Filed June 7, 2005

On Petition for Rehearing and Rehearing En Banc

The appellees/cross-appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge King, Judge Gregory, and Senior Judge Hamilton.

For the Court,
s/ Patricia S. Connor
Clerk

COMMERCIAL GENERAL LIABILITY PROTECTION

This insuring agreement provides general liability protection for your business. There are of course, limitations and exclusions which apply to that protection. As a result this agreement should be read carefully to determine the extent of the coverage provided to you and other protected persons

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Individual.

Partnership or joint venture.
Limited liability company.
Corporation or other organization.
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Operators of registered mobile equipment.
Newly acquired or formed organizations.
Separation of protected persons.

Limits Of Coverage

General total limit.
Products and completed work total limit.
Personal injury each person limit.
Advertising injury each person limit.
Each event limit.
How the limits of coverage apply to
an extension of the policy period.
How the limits of coverage apply if a
total limit is left blank.

Exclusions

What This Agreement Won't
Cover
Advertising, broadcasting, publishing,
or telecasting business.
Aircraft.
Auto.
Breach of contract.
Contract liability.
Control of property.
Damage to your products or completed work.

Deliberately breaking the law.
Employers liability.
Expected or intended bodily injury or property damage.

Other Insurance
Other primary insurance.

What This Agreement Covers

Bodily injury and property damage liability. We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury or property damage that:
• happens while this agreement is in effect; and
• is caused by an event.

Protected person means any person or organization who qualifies as a protected person under the who Is Protected Under This Agreement section.

Bodily injury means any physical harm, including sickness or disease, to the physical health of other persons. It includes any of the following that results at any time from such physical harm, sickness, or disease:
• Mental anguish, injury, or illness.
• Emotional distress,
• Care, lass of services, or death.

Property damage means:
• physical damage to tangible property of others, including all resulting loss of use of that property; or
• loss of use of tangible property' of others that isn't physically damaged. For example:

One of your employees accidentally causes a fire in your premises. The fire department responds and orders nearby businesses to close for safety reasons while it fights the fire. Your premises is heavily damaged by the fire. But none of the nearby businesses are Physically damaged. As a result, we'll consider the period of time those businesses ore closed due to your fire to be loss of use of tangible property of others that isn't physically damaged.

We'll consider all loss of use of:
• damaged tangible property to happen at the time of the physical damage which caused it; and
• undamaged tangible property to happen at the time of the event which caused it.

Event means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Personal injury liability. We'll pay amounts any protected person is legally required to pay as damages for covered personal injury that:

• results from. your business activities, other than advertising, broadcasting, publishing, or telecasting, done by or for you; and
• is caused by a personal injury offense committed while this agreement is in effect.
Personal injury means injury, other than bodily injury or advertising injury, that's caused by a personal injury offense.
Personal injury offense means any of the following offenses:
• False arrest, detention, or imprisonment.

- Malicious prosecution,
- Wrongful entry into, or wrongful eviction from, a room, dwelling, or premises that a person occupies.
- invasion of the right of private occupancy of a room, dwelling, or premises that a person occupies.
- Libel or slander.
- Making known to any person or organization written or spoken material that disparages the products, work, or completed work of others.
- Making known to any person or organization written or spoken material that violates a person's right of privacy.

Advertising means attracting the attention of others by any means for the purpose of seeking customers or increasing sales or business.

Broadcasting means transmitting any audio material by radio, or transmitting or televising any audio or visual material by television, for any purpose.

Publishing means creating and producing any material in an electronic or printed format for distribution or sale to others for any purpose.

But we won't consider creating and producing any of the following material in an electronic or printed format to be publishing:

- Correspondence written in the conduct of your business
- Material that describes or reports your business activities including bulletins, financial , or annual reports, and newsletters.

Telecasting means transmitting or televising any audio

or visual material by television for any purpose.
Advertising Injury liability. We'll pay amounts any protected person is :legally required to pay as damages for covered advertising injury that:
• results from the. advertising of your products, work, or completed work; and is caused by an advertising injury offense committed while this agreement is in effect.

Advertising injury means injury, other than bodily injury or personal injury, that's caused by an advertising injury offense. Advertising injury offense means any of the following offenses:
• Libel or slander.
• Making known to any person or organization written or spoken material that disparages the products, work, or completed work of others.
• Making known to any person or organization written or spoken material that violates a person's right of privacy.
• Unauthorized use of any advertising idea, material, slogan, style, or title of others in your advertising.
We explain what we mean by:
• advertising in the Personal, injury liability.. section; and
• your products, your work, and your completed work, in the products and completed work total limit section.
Medical expenses. We'll pay covered medical expenses that result from bodily injury caused by an event which happens while this agreement is in effect, even if the protected person isn't legally required to pay such expenses.

Medical expenses means the reasonable expenses incurred by any person or organization for necessary

medical services received by a person anytime within one year of the beginning date of an event which causes that person to sustain bodily injury.

Medical services includes:
• first aid received at the time of an event;
• ambulance and emergency care services;
• dental, hospital, medical, nursing, surgical, x-ray, and other health care professional services, artificial limbs and organs; and
• funeral services.

Right and duty to defend a protected person, We'll have the right and duty to defend any protected person against a claim or suit for injury or damage covered by this agreement: We'll have such right and duty even if all of the allegations of the claim or suit are groundless, falser or fraudulent. But we won't have a duty to perform any other act or service.

Right and duty to defend a protected persons

We'll have the right to investigate any event, offense, claim, or suit to the extent that we believe is proper. We'll also have the right to settle any claim or suit within:
•any applicable deductible; or
• the available limits of coverage.

Our duty to defend protected persons ends when eve have used up the limits of coverage that apply with the payment of:
• judgments;
• settlements;
• medical expenses; or

• indemnitee defense expenses assumed under contract.

We explain what we mean by indemnitee defense expenses assumed under contract, and when we'll pay such expenses, in the Contract liability exclusion.

Claim means a demand which seeks damages.

Suit means a civil proceeding which seeks damages: It includes:
• an arbitration proceeding for such damages to which the protected person must . submit, or submits with our consent; and
• any other alternative dispute resolution proceeding for such damages to which the protected person submits with our consent.
Injury or damage means:
• bodily injury, personal injury, or advertising injury; or
• property damage.

Offense means any:
• personal injury offense; or
• advertising Injury offense.

Additional payments. We'll have the duty to make only the additional payments shown below in connection with any claim or suit under this agreement against a protected person when we:
• investigate or settle the claim or suit; or
•defend the protected person against the claim or suit.

These payments are in addition to the limits of coverage.

Our duty to make additional payments ends when we have used up the limits of coverage that apply with the payment of:

- judgments;
- settlements;
- medical expenses; or
- indemnitee defense expenses assumed under contract.

We explain what we mean by indemnitee defense expenses assumed under contract, and when we'll pay such expenses, in the Contract liability exclusion.

Our expenses. We'll pay all expenses we incur.

Bail bonds. We'll pay up to $2,500 of the cost of bail bonds that are required because of accidents or violations of traffic laws. But only if the accidents or violations result from the use of a vehicle to which this agreement applies. We don't have to furnish such bonds.

Bonds to release property. We'll pay the cost of bonds to release property that's being used to secure a. legal obligation. But only for bond amounts within the limit of coverage that applies. We don't have to furnish such bonds.

Expenses incurred by protected persons. We'll pay all reasonable expenses that any protected person incurs at our request while helping us investigate or settle, or defend a protected person against, a claim or suit. But we won't pay more than $500 per day for earnings actually lost by the protected person because of time taken off from work.

Taxed cost .We'll pay all costs taxed against any protected person in a suit.

Prejudgment interest. We'll pay the interest that accumulates before a judgment and is- awarded against the protected person on that part of- a judgment we pay. But if we make a settlement offer to pay the available limit of coverage, we won't pay the prejudgment interest, that accumulates after the date of our offer.

Postjudgment interest. We'll pay all interest that accumulates on the full amount of that part of a judgment for which we make a payment.But only from the date of the judgment to the date we pay, or deposit in court, the limit of coverage that applies to the judgment.

Right to appeal a judgment against a protected person. We'll have the right to appeal a judgment awarded in a suit for injury or damage covered by this agreement if:
• we defend a protected person against the suit; and
• the judgment is awarded against that protected person.

If were appeal such a judgment, we'll pay all expenses which- result directly from that appeal, including postjudgment interest and the cost of appeal bonds. Such appeal expenses are in addition to the limits of coverage. However, the results of an appeal won't change the limit's of coverage that apply under this agreement.

When This Agreement Covers

Bodily, injury and property damage liability. We'll

apply this agreement to claims or suits for covered bodily injury or property damage whenever they're made or brought.

Personal injury liability. We'll apply this agreement to claims or suits for covered personal injury whenever they're made or brought.

Advertising injury liability. we'll apply this agreement to claims or, suits for covered advertising injury whenever they're made or brought.

Medical expenses. We'll apply this agreement to covered medical expenses only when they're reported to us within one year of the beginning date of the event.

Where This Agreement Covers

We'll apply, and make, payments under this agreement:
• only in the coverage territory; and
• only for covered injury or damage that's caused by events or offenses, which happen or are committed here.

However, we'll also apply, and make payments under, this agreement in the coverage territory, for covered injury or damage that's caused by events or offenses which happen or are committed in the rest of the world if:
•the protected person's liability for such injury or damage is determined in a suit
•on the merits in the coverage territory, or in a settlement agreed to by us; and
• they result from the activities of, a person whose home is in the coverage territory, but is away from

there for a short time on your business; or
• they result from your products that are made or sold by you in the coverage territory,

For example:

You manufacture a product in the coverage territory. It is exported to Norway. A few months later a Norwegian citizen is allegedly injured while using that product and, as a result, sues you. If the suit is brought against you in the coverage territory, and it seeks damages for bodily injury covered by this agreement, we'll have the duty to defend. you against the suit and pay covered damages awarded in a judgment against you. However, if the suit is brought against you in Norway, or anywhere else outside of the coverage territory, we won't have a duty to defend you there. Also, we won't have a duty to pay a judgment awarded by a court there, every if the judgment is later recognized and enforced by a court in the coverage territory.

Coverage territory means:
•the United States of America, including its territories and possessions;
•Puerto Rico;
•Canada; and
•International waters or airspace only during travel or transportation between any of the above places.

We explain what we mean by your products in the Products and completed work total limit section.

Who Is Protected Under This Agreement

Individual. If you are shown in the Introduction as a named insured and an individual, you and your spouse are protected persons only for the conduct of a business of which you are the sole owner.

Partnership or joint venture. If you are shown in the Introduction as a named insured and a partnership or a joint venture, you are a protected person. Your partners or co-venturers, and their spouses, are protected person only for the conduct of your business

Limited liability company. If you are shown in the Introduction as a named insured and a limited liability company, you are a protected person. Your members are protected persons only for the conduct of your business. And your managers are protected persons only for their duties as your managers.

Corporation or other organization. If you are shown in the Introduction as a named insured and a corporation or an other organization, you are a protected person. Your directors and executive officers are protected persons only for the conduct of their duties as your directors or executive officers. And your stockholders are protected persons only for their liability as your stockholders.

Other organization means an organization other than a corporation, partnership, joint venture, or limited liability company.
Executive officer means any person holding an officer position created by the charter, constitution, or by-law's, or any other similar governing document, of a corporation or other organization.

Employees and volunteer workers. Your employees are protected persons only for:
• work done within the scope of their employment by you; or
• their performance of duties related to the conduct of your business.

And your volunteer workers are protected persons only for activities or work they conduct or perform:
• at your direction; and
• within the scope of their duties for you.

However, no employee or volunteer worker is protected person for bodily injury or personal injury to:
• you;
• any of your partners or co-venturer if you are a partnership or joint venture;
• any of your members or managers if you re a limited liability company,
• any fellow employee;
• any fellow volunteer worker or any of your employees; or
• the spouse or any child, parent, brother, or sister of that employee or volunteer worker if such injury results from the bodily injury or personal injury to the fellow employee or volunteer worker.

Nor is any employee or volunteer worker a protected person for:
• any obligation to share damages with or repay someone else who must pay damages because of such bodily injury or personal injury; or
• bodily injury, or personal injury that results from his or her performance of or failure to perform health care professional services.

Also, no employee or volunteer worker is a protected person for property damage to property that's controlled by:

- you;
- any of your partners or co-venturers if you are a partnership or joint venture;
- any of your members or managers if you are a limited liability company;
- that employee or any fellow employee; or
- that volunteer worker; any fellow volunteer worker, or any of your employees.

But we won't apply the exclusions in this Employees and volunteer workers section to:

- bodily injury that results from the providing of or failure to provide first aid by an employee or volunteer worker, other than an employed or volunteer doctor; or
- premises damage.

Nor will we apply this ,Employees and- volunteer workers section to the following protected persons:.

- Your managers if you are a limited liability, company. Instead, we'll apply the Limited liability company section to them.
- Your executive officers if you are a corporation or an other organization. Instead, we"ll apply the Corporation or other organization section to them.

Employee includes a leased worker, other than a leased temporary worker.

Leased worker means any person who:

- is hired from an employee leasing firm under a contract or agreement between the hirer and that firm; and
- is performing duties related to the conduct of the

hirer's business.

Volunteer worker means any person other than;
• an employee; or
• a leased temporary worker.

Employee leasing firm means any person or organization who hires out workers to others. It includes any:
• employment agency, contractor, or service;
• labor leasing firm; or
• temporary help service.

Leased temporary worker means. a leased worker who is hired. to:
• temporarily take the place of a permanent employee on, leave; or
• meet seasonal or short-term workload
• conditions. Controlled by means:
• owned; rented, leased, occupied, borrowed, or used by;
• in the care, custody, or control of; or
• being physically controlled for any purpose by.

Health care professional Services includes:
• any dental, medical, mental, nursing, surgical, x-ray, or other health care professional service, including any advice, instruction, food, or beverage provided with such service;
• the dispensing of drugs or medical or dental supplies and appliances; and
• the handling or treatment, of corpses, including autopsies, organ donations, and other postmortem procedures.

We explain what we mean by premises damage in the Each, event limit section.

Real estate managers. Your real estate managers are protected persons only for their management of premises that you own, or rent, lease, or borrow from others. They may be persons or organizations.

But we won't apply this Real estate managers section to your employees. Instead, we'll apply the Employees and volunteer workers section to them.

Landlords. Any landlord. of a premises rented or leased to you is a protected person only for the ownership, maintenance, or use of the premises while you rent or lease it.

However, no landlord is a protected person for injury or damage that results from any of the following work while being done by
or for the landlord:
- Structural changes.
- New construction work.
- Demolition work.

Landlord means the owner, lessor, or manager of a premises.
Equipment lessors. Any lessor of equipment rented or leased to you is a protected person on or our operation, maintenance, or use of the equipment while you rent or lease it.

However, no equipment lessor is a protected person for injury or damage that results from their sole negligence

Lessor means the owner or lessor.

Operators of registered mobile equipment. All operators of registered mobile equipment are protected persons for their driving of such equipment on a public street or road with your permission.

Any person or organization legally responsible for the driving conduct of those operators is also a protected person. But only if there's no other valid and collectible insurance available to cover their liability for the operators.

However, no operator or any other person or organization is a protected person for:
• bodily injury to a fellow employee of the person driving the equipment; or
• property damage to property controlled by you .or the employer of an operator who is a protected person.

Registered mobile equipment means mobile equipment that's registered in your name under a motor vehicle registration law.

We explain what we mean by:
•controlled by in the Employees and volunteer workers section; and
• mobile equipment in the Mobile equipment exclusion.

Newly acquired or formed organizations. Any organization, other than a partnership, joint venture, or limited liability company, that you acquire or form while this agreement is in effect is a protected person if you own more than 50% of it.

However, no newly acquired or formed organization is a protected person for:

• more than 90 days, or the remainder of the time this agreement is in effect, whichever is less, from the date that you acquire or form it, unless we agree that it should continue to be a protected person after the end of that period of time; bodily injury or property damage that happened before you acquired or formed it;

• personal injury or advertising injury that results from an offense committed before you acquired or formed it; or

• injury or damage that's covered by other similar general liability insurance.

Separation of protected persons. We'll apply this agreement separately to each protected person.

However, the limits of coverage shown in the Coverage Summary are shared by all protected persons. We explain how in the Limits Of Coverage section.

Also, any right or duty specifically assigned to the first named inured remains unchanged, We explain, those rights and duties in the General Rules, which it a part of your policy.

Limits Of coverage

The limits shown in the Coverage Summary and the information contained in this section fix the most we'll pay as damages and medical expenses, regardless of the number of:

• protected persons;

• claims made or suits brought; or

• persons or organizations making claims or bringing suits.

General total limit. This is the most we'll pay for the combined total of:
• all covered bodily injury and property damage that happens in a policy, year;
• all covered personal injury that's caused by all personal injury offenses committed in a. policy year;
• all covered advertising injury that's caused by all advertising, injury offenses committed in a policy year; and,
• all covered medical expenses that result from all events which happen in a policy year.

However, we won't apply this limit to bodily injury or property damage that results from your products or completed work. Instead, we'll apply. the products and completed work total limit to such bodily injury or property damage covered by this agreement.

Policy year means the policy period shown in the Introduction, or the period of time that this agreement is in effect, whichever is less. But when that period is longer than one year it means each consecutive annual period, and the remaining period if any, that this agreement is in effect, starting with the beginning date of this agreement.
We explain the products and completed work total limit and what we mean by your products and your completed work in the Products and completed work total limit section

Products and completed work total limit This is the most we'll pay far all covered bodily injury end property damage that:
• results from your products and completed work; and
• happens in a policy year.

Your products means any of the goods or products that are or were manufactured, sold, handled, distributed, or disposed of by:
• you;
• others using your name; or
• any person or organization whose business or assets you've acquired.

Your products includes:
• all containers, equipment, materials, or parts provided with or for your products;
• any warranty provided with or for your products;
• any statement made, or which should have been made, or about ,the durability, fitness, handling, maintenance, operation, performance, quality, safety, or use of your products; and
• all warnings, instructions, or directions provided, or which should have been provided, with or for your products.

But we won't consider the following to be your products:

• Goods or products which are still in your physical possession. or on a premises that you own, or rent, lease, or borrow from others,
• Real property.
•Containers that are vehicles.
• Property that's rented or leased to others.
• Property that you haven't sold, but which you allow others to use. For example, a vending machine.

Your completed work means your work that is completed at the earliest of the following times, in work that may need service, maintenance, correction,

repair, or replacement, but which is otherwise complete:

- When all of the work called for in your contract has been completed.
- When all of the work to be done at the work site has been completed, if your contract calls for work at more than one site.
- When that part of the work at the work site has been put to its intended use by any person or organization, other than another contractor or subcontractor working on the same project.

But we won't consider the following to be your completed work:

- Work that hasn't yet been completed or abandoned.
- Uninstalled equipment; abandoned or unused materials, or tools.
- Work done in connection with transporting property.
- Any premises or other real property that you own.
- Any work done to a premises or other real property that you rent or lease from others..
- Any work while on a premises that you own, or rent, lease, or borrow from others.

However, we'll. consider a condition created in or on a vehicle in the course of work done in connection with transporting property to be your completed work when:

- the vehicle isn't owned or operated by you;
- the condition is created by the loading or unloading of the vehicle by a protected person; and
- the condition causes bodily injury or property damage.

Your work means any:

- work that you're performing or others are performing

for you; or
• service that you're providing or others are providing for you.

Your work includes:
• all equipment, materials, or parts provided with or for your work;
• any warranty provided with or for your work;
• any statement made, or which should have been made, about the. durability, fitness, handling, maintenance; operation, performance, quality, safety, or use of your work; and
• all warnings, instructions, or directions provided, or which should have been provided, with or for your work.

We explain what we mean by loading or unloading in the Auto exclusion.

Personal injury each person limit. This is the most we'll pay for all covered personal, injury that:
• is sustained by any one person or organization; and
• is caused by all personal injury offenses committed in a policy year.

Advertising injury each person limit. This is the most we'll pay for all covered advertising injury that:
• is sustained by any one person. or organization; and
• is caused by all advertising injury offenses committed in a policy year.

Each event limit. This is the most we'll pay for all covered bodily injury, property damage, and medical expenses that result from any one event.

However, the most we'll pay for covered premises damage or medical expenses that result from any one event is further limited by the following:

Premises damage limit. This is the most we'll pay for all covered premises damage that's caused by any one event.

Premises damage means property damage to premises that you rent, lease, or borrow from others.

Medical expenses limit. This is the most we'll pay for all covered medical expenses that:
• are incurred for bodily injury sustained by any one person; and
• result from any one event.

Hour the limits of coverage apply to an extension of the policy period. If the original policy period shown in the Introduction is extended for less than 12 months, we'll consider each extended period to be part of the last policy year. For example:

Your policy period is for three yeas. During the last policy year you request a three month extension, we agree. As a result; your last policy year becomes 1 months. It will be subject to the same limits of coverage that applied when the policy year was 12 months.

How the limits of coverage apply if a total limit is left blank, if the amount of the general total limit or the products and completed work total limit is left blank in the Coverage Summary, we'll consider that total limit to be the same as the each event limit or $200,000,

whichever amount is more.

Exclusions - What This Agreement Won't Cover

Advertising, broadcasting, publishing, or telecasting business. We won't cover advertising injury that results from an offense committed by any protected person in the business of advertising, broadcasting, publishing, or telecasting.

Aircraft. We won't cover bodily injury, property damage, or medical expenses that result from the:
• ownership, maintenance, use, or operation;
• loading or unloading; or
• entrustment to others;
of any aircraft owned, operated, rented, leased, or borrowed by any protected person.

But we won't apply this exclusion to:

• bodily injury or property damage for whic.. the protected person bas assumed liability under a covered contract for the ownership, maintenance, or use of an aircraft;
• bodily injury, property damage, or medical expenses that result from the operation. of specialized equipment; or
• premises damage.

Nor will we apply this exclusion to bodily injury, property damage, or medical expenses that result from the use of an aircraft chartered by a protected person if:

• the aircraft is chartered with crew, including a pilot; and

• the protected person isn't using the aircraft to carry persons or property for a charge.

We explain what we mean by:
• covered contract in the Contract liability exclusion;
• entrustment to others, and loading or unloading, in the Auto exclusion;
• premises damage in the Each event limit section; and
• specialized equipment in the Mobile, equipment exclusion.

Auto. We won't cover bodily injury, property damage, or medical expenses that result from the:
• ownership, maintenance, use, or operation;
• loading, or unloading; or
• entrustment to others;
of any auto owned, operated, rented, leased, or borrowed by any protected person.

But we won't apply this exclusion to bodily injury, property damage, or medical expenses that result from the parking of an auto on a premises, or on the ways next to such premises if:
• the premises is owned, rented, leased, or borrowed by you; and
• the auto isn't owned, rented, leased, or borrowed by any protected person.

Nor will we apply this exclusion to:
• bodily injury, property damage, or medical. expenses that result from the operation of specialized equipment; or
• premises damage.
Auto means any land motor vehicle, trailer, or semi-trailer designed for travel on public streets or roads. It

includes any permanently attached machinery or equipment. But we won't consider mobile equipment to be an auto,

Loading or unloading means the handling of property:
• while it's being moved from the place where it's accepted for transportation;
• while it's being loaded, transported, and unloaded; and
• until it's moved to the place where it's finally delivered.

But we won't consider moving property by an unattached mechanical device to be loading or unloading.

Unattached mechanical device includes any forklift, conveyor, or other unattached mechanical device, other than a hand truck.

Entrustment to others means:
• the permitting of others to use or do something; or
• the giving of something to others for safekeeping.

We explain what we mean by:
• mobile equipment and specialized equipment in the Mobile equipment . exclusion; and
•premises damage in the Each event limit section.

Breach of contract won't cover advertising injury that results from the failure of any protected person to do what is required by a contract or agreement,

But we won't apply this exclusion to advertising injury that results from the unauthorized use of an advertising

idea if such use is not specifically prohibited by the contract or agreement.

Contract Liability. We won't cover injury or damage for which the protected person has assumed liability under any contract or agreement.

But, we won't apply this exclusion to injury or damage for which the protected person would have liability without the contract or agreement.

Nor will we apply this exclusion to bodily injury or property damage for which the protected person has assumed liability under a covered contract made before the bodily injury or property damage happens.
Also, if the protected person has agreed under the same covered contract to defend, or pay for the defense of an indemnitee against a claim or suit for such bodily injury or property damage, we'll have the duty to defend the indemnitee against the claim or suit only if:
• the indemnitee isn't a protected person for the bodily injury or property damage;
• the claim or suit is for bodily injury or property carnage for which that protected person has assumed the liability of the indemnitee under the covered contract;
• the bodily injury or property damage is covered by this agreement;
• the claim or suit is made or brought against that protected person and the indemnitee;
• we are defending that protected person against the claim or suit under this agreement;
• all of our indemnitee defense control and authority requirements are fulfilled; and
• all of our indemnitee defense cooperation and notice

requirements are fulfilled. When the indemnitee is a protected person for the claim or suit, we'll apply the right and duty to defend a protected person section, rather than this contract liability indemnitee defense coverage, in connection with such claim or suit.

If we have the duty to defend the indemnitee under the contract liability indemnitee defense coverage, we'll do the following:

- We'll defend the indemnitee against the claim or suit even if all of the allegations of such claim or suit are groundless, false, or fraudulent. But we won't have a duty to perform any other act or service.
- We'll pay all covered indemnitee defense expenses incurred by us in connection with the claim or suit. Such payments are in addition to the limits of coverage.

However, if we don't have a duty to defend the indemnitee under

- the contract liability indemnitee defense coverage; or
- the Right and duty to defend a protected person section;

we'll pay covered indemnitee defense expenses assumed under contract as if they're damages covered by this agreement: Such payments are subject to the limits of coverage.

Our duty to defend an indemnitee, or pay indemnitee defense expenses incurred by us, under the contract liability indemnitee defense coverage ends when the indemnitee fails to comply with any of our indemnitee defense cooperation and notice requirements. It also ends when we have used up the limits of coverage that apply with the payment, of:

- judgments;

• settlements;
• medical expenses; or
• indemnitee defense expenses assumed. under contract.

We'll have the right to appeal a judgment awarded in a suit against an indemnitee if:
• the judgment is for injury or damage for which you have assumed liability under a covered contract;
• such injury or damage is covered by this agreement;
• the indemnitee and its insurers don't appeal the judgment; and;
• you agree that we may seek the cooperation of- the indemnitee for such an appeal.

If we appeal such a judgment, we'll pay all expenses which result directly from that appeal, including post judgment interest and the cost of appeal bonds. Such appeal expenses are in addition to the limits of coverage. However, the results of an appeal won't change the limits of coverage that apply under this agreement.

Covered contract means:
• any easement or license agreement;
• any elevator. Maintenance agreement;
• any lease of premises, other than that part which indemnifies a person or organization for property damage to a premises that you rent, lease, or borrow from others;
• any obligation to indemnify a municipality that is required by ordinance and isn't connected with your work for the municipality; .
• any sidetrack agreement;
• that part of any other contract or agreement under

which you assume the tort liability of a municipality to pay damages for bodily injury. or property damage that is sustained by others and results from your work for the municipality; or

• that part of any other contract or agreement under which you assume the tort liability of another to pay damages for bodily injury property damage that's sustained by others.

But we won't consider the following parts of those other contracts or agreements under which you assume the tort liability of another to pay damages to be a covered contract:

• Architect, engineer, or surveyor indemnity,
• Architect, engineer, or surveyor professional services by protected person indemnity.
• War indemnity.

Tort liability means a liability that would be imposed by law without any contract or agreement.

Architect, engineer, or, surveyor indemnity means that part which indemnifies any architect, engineer, or surveyor for injury or damage that results from:

• the preparation or approval of, or failure to prepare or approve, any drawing and, specification ,map, opinion, report, or survey, or any change order, field order; or shop drawing; or

• the giving of or failure to give any direction or instruction if that, giving or failure to give is the primary cause of the injury or damage.

Architect, engineer, or surveyor professional services by protected person indemnity means that part which

indemnifies any person or organization for injury or damage that results from the performance of or failure to perform architect, engineer, or surveyor professional services by the protected person who is an architect, engineer, or surveyor.

Architect, engineer, or surveyor professional. services includes:
• the preparation or approval of any drawing and specification, map, opinion, report, or survey, or any change order, field order, or shop drawing; and
• any architectural, engineering, inspection, or supervisory activity.

War indemnity means that part which indemnifies any person or organization for bodily injury by property damage that results from war.

Indemnitee means any person or organization who a protected person has agreed under a covered contract to indemnify or hold harmless.

Indemnitee defense control and authority requirements means the following requirements which must be fulfilled for us to conduct and control the defense of an indemnitee against a claim or suit under this agreement:
• The protected person and the indemnitee must ask us to conduct and control the defense of the indemnitee against the claim or suit under this agreement.
• We must determine that there's no conflict between the interests of the protected person and those of the indemnitee, based on the allegations in the claim or suit and on what we know about the factual and legal basis for the damages being sought.

• The protected person and the indemnitee must each agree in writing that we can assign the same counsel to defend them.
• The indemnitee must give us authority in writing to conduct and control its defense against the claim or suit;
• The indemnitee must give us authority in writing to obtain records and other information related to the claim or suit
• The indemnitee must agree in writing to comply with our indemnitee defense cooperation and notice requirements.

lndemnitee defense cooperation and notice requirements means the following requirements which must be fulfilled for us to continue defending an indemnitee against a claim or suit under this agreement:
• The indemnitee must cooperate with us in the investigation, settlement, or defense of the claim or suit.
• The indemnitee must provide us with a copy of any demand, notice, summons, or legal paper received in connection with the claim or suit as soon as possible after it is received.
• The indemnitee must give notice of the claim or suit to any other insurer which provides coverage that's applicable to the claim or suit and available to the indemnitee,
•The indemnitee must help us coordinate the application of other insurance that's applicable to the claim or suit and available to the indemnitee.

Indemnitee defense expenses incurred by us means the:
• attorney fees and necessary litigation expenses

incurred by us to defend an indemnitee against a claim or suit for damages covered by this agreement; and
• necessary litigation expenses incurred by the indemnitee at our request in connection with that claim or suit.
Indemnitee defense expenses assumed under contract means the reasonable attorney fees and necessary litigation expenses which:
• are incurred by or for an indemnitee to defend itself against a claim or suit for damages covered by this agreement; and
• are subject to a covered contract under which a protected person has agreed to defend, or pay for the defense of the indemnitee against the claim or suit.

We explain what we mean by war in the Medical expenses of certain persons exclusion.

Control of property. We won't cover property damage to the following property:
• Property that you own, or rent, lease or borrow from others, or occupy. But we won't apply this exclusion part to premises damage.
• Premises that you sell, give away, or abandon if such property damage results from any part of those premises. But we, won't apply this exclusion part to property damage to premises which are your completed work and were never occupied, rented, or held for rental by you.
• Personal property that's in the care, custody, or control of the protected person.
• That particular part of real property being worked on by or for you if such property damage results from your work.
• That particular part of any property which must be

restored, repaired, or replaced because your work was incorrectly performed on it. But, we won't apply this exclusion part to property damage that results from your completed work.
Furthermore, we won't apply this exclusion to property damage, other than property damage to the property described below, for which the protected person has assumed liability under a sidetrack agreement:
• Property that you own, or rent or lease from others, or occupy.
• Premises that you sell, give away, or abandon.

We explain what we mean by premises damage in the Each event limit section.

Damage to your products or completed work. We won't cover property damage to any of your products that's caused by the product itself or by any of its parts. For example:

You manufacture air conditioners. They contain several moving parts which can break down for many reasons. Regardless of the cause, we would protect you for any property damage to the part that fails or to the rest of the air conditioner.

Nor will we cover property damage to your completed work that's caused by the work itself or by any of its parts. But we won't apply this exclusion part if:
• this agreement provides completed work liability coverage; and
• the damaged completed work, or the completed work that causes the property damage, was done for you by others.

For example:

You construct a building as a general Contractor. Some of the work is done by you while the rest is done for you by subcontractors. The building is accepted by the owner. If it's damaged by a fire caused by electrical wiring installed by a subcontractor, we won't apply the exclusion. However, if the wiring was installed by you, we'll apply the exclusion to property damage to your completed work done by you.

We explain what we mean by your products and your completed work in the Products and completed work total limit section.

Deliberately breaking the law. We won't cover personal injury or advertising injury that results from:
• the protected person knowingly breaking any original law; or
• any person or organization breaking any criminal law with the consent or knowledge of the protected person.

Employers liability. We won't cover bodily injury to an employee of the protected person arising out of and in the course of his or her:
•employment by the protected person; or performance of duties related to the conduct of the protected person's business.

Nor will we cover bodily injury to the spouse or any child, parent, brother, or -sister of that employee if such bodily injury results from the bodily injury to the employee.

We'll apply this exclusion whether the protected person

may be held liable as an employer or in any other capacity, such as a property, owner or product, manufacturer.
For example:
You manufacture tires. Your employee is injured while driving a company truck equipped with your tires, when one of the tires blows out resulting in an accident. He receives workers compensation benefits. If he later sues you in your capacity as a manufacturer, alleging that his injury happened because your product was defective, we won't protect you.

We'll also apply this exclusion to any obligation of the protected person to share damages with or repay someone else who must pay damages because of bodily injury to any employee of the protected person. For example:

Your employee is injured in a printing press accident. She receives workers compensation benefits. Later, she sues the manufacturer of the printing press alleging that her injury happened because the press didn't have enough guarding devices on it. If the manufacturer in turn sues you , alleging that, your faulty maintenance of the press - not the lack of guarding devices - resulted in the employee's injury, we won't protect you.

But we won't apply, this exclusion to bodily injury for which the protected person has, assumed liability under a covered contract.

We explain what we mean by covered contract in the Contract liability exclusion.

Expected or intended bodily injury or property

damage. We won't cover bodily injury or property damage that's expected or intended by the protected person. Nor will we cover medical expenses that result from such bodily injury.
But we won't apply this exclusion to bodily injury, property damage, or medical expenses that result from the use of reasonable force to protect people or property.

False material. We won't cover personal injury or, advertising injury that results from false written or spoken material which:
• was made known by or for the protected person; and
• the protected person knew was false when it was made known.

Impaired property. We won't cover property damage to impaired property, or to property which isn't physically damaged, that results from:
• your faulty or dangerous products or completed work; or
• a delay or failure in fulfilling the terms of a contract or agreement.

But we won't apply this exclusion to the loss of use of property, other than your products or completed work that results from sudden and accidental physical damage to your products or completed work after they've been put to their intended use. For example:

You supply an electric motor to a customer who uses it to power his conveyor. The motor's shaft breaks several days later while he's operating the conveyor. The conveyor isn't damaged but your customer has extra costs because he's unable to use it until the motor is

repaired. If he sues you to recover those costs, we worn' t apply the exclusion. However, if the customer discovers. while hooking the motor up to the conveyor that the motor's shaft is broken, we won't protect you. Impaired property means tangible property, other than your products or completed work, that can be restored to use by nothing more than:

• an adjustment, repair, replacement, or removal of your products or completed work which forms a part of it; or

• your fulfilling the terms of a contract or agreement.

We explain what we mean by your products and your completed work in the Products and completed work total limit section.

Intellectual property. we won't cover injury or damage that results from any actual or alleged infringement or violation of any of the following rights or laws:

• Copyright.
• Patent.
• Trade dress.
• Trade name.
• Trade secret.
•Trademark.
• Other intellectual property rights or laws.

But we won't apply this exclusion to:

• bodily injury or property damage that results from your products or completed work; or

• advertising injury that results from the unauthorized use of any copyrighted or trademarked advertising material, slogan, style, or title of others in your advertising.

We explain what we mean by your products and your completed work in the Products and completed work total limit section. Liquor liability. We won't cover bodily injury, property damage, or medical expenses that result from any protected person:
• causing or contributing to the intoxication of any person;
• selling, serving, or furnishing alcoholic beverages to any person under the legal drinking age or under the influence of alcohol;. or
• violating any law or regulation applying to the sale, gift, distribution, or use of alcoholic beverages.

However, well apply this exclusion only if you're in the business of manufacturing, distributing, selling, serving, or furnishing alcoholic beverages For example:

You manufacture office equipment. Each year you host an awards banquet with an open bar for your sales representatives. After this year's banquet an intoxicated guest is involved in an auto accident. The guest and several others are injured. If someone sues you, alleging that your serving of liquor caused the guest's intoxication and involvement in the accident, we won't apply the Liquor liability exclusion because you're not in the business of serving liquor.

But we won't apply this exclusion to premises damage.

We explain what were mean by premises damage in the Each event limit section.

Material previously made known. We won't cover personal injury or advertising injury that results from written or spoken material which was first made known

before this agreement event into effect.

Medical expenses of certain persons. We won't cover medical expenses that are incurred by or for any- person:
• injured while qualifying as a protected person;.
• injured while performing work that he or she was hired to do for any protected person or any tenant of a protected person;
• injured on that part of any premises that- you own, or rent or lease from others and which the injured person normally occupies;
• to whom such medical expenses are payable, or must be provided, as benefits under any workers compensation, disability benefits, or similar law;
• injured by your products or completed work;
• injured due to war; or
• who refuses to be examined as often as we require, within reason, by doctor we choose.

War includes:
• declared or undeclared war, or invasion;
• warlike action by a military force or other agents of any government, sovereign, or other authority;
• civil war, insurrection, rebellion, revolution, or seizure of power; or
• anything done to hinder or defend against such actions.

We explain what we mean by your products and your completed work in the Products and completed work total limit section.

Mobile equipment. We won't cover bodily injury, property damage, or medical expenses that result from

the;
• transportation of mobile equipment by an auto owned, operated, rented, leased, or borrowed by any protected person; or
• use of racing mobile equipment.

But we won't apply this exclusion to premises damage.

Mobile equipment means any land vehicle that:
• is designed for use primarily off public streets or roads;
• is kept for use only on or next to premises that you own or rent or lease from others;
• travels on crawler treads;
• is kept primarily for the ready movement of permanently attached construction equipment; or
• doesn't travel under its own power and is kept primarily for the ready movement of permanently attached specialized equipment.
Mobile equipment includes any land vehicle that:
• isn't described above; and
• is kept primarily for purposes other than carrying people or cargo.

But we won't consider such a vehicle to be mobile equipment if it:
• travels under its own power;
• is operated like an auto during travel on a public street or road; and.
• has permanently attached specialized equipment; or
• has permanently attached equipment designed for snow removal, street cleaning, or street or road maintenance but not construction or resurfacing.

Construction equipment includes any:

• grader; scraper, or roller; or
• power crane, digger, drill, loader, or shovel.

Specialized equipment means any:
• cherry picker or similar device used to lift workers;
• pump generator, or air compressor; or
• other equipment, such as building clearing, geophysical exploration, lighting, spraying, welding, or well-servicing equipment, that has a built-in pump, generator, or air compressor

Racing mobile equipment mean any mobile equipment while being prepared for or used in any:
• prearranged racing, speed, demolition, or stunting contest or activity; or
• practice for such contest or activity.

We explain what we mean by:
• auto in the Auto exclusion; and
• premises damage in the Each event limit section.

Nuclear energy liability. We won't cover bodily injury or property damage for which any protected person:
• is also protected under a nuclear energy liability insurance policy; or
• would have been protected under such policy if that policy's limits of coverage hadn't been used up.

Nor will we cover bodily injury or property damage that results from the hazardous properties of nuclear material and for which:
• any person or organization is required by law to maintain financial protection in accordance with the federal Atomic Energy Act or any of its amendments; or

• any protected person is entitled, or would have been entitled had this agreement not been issued, to indemnity from the United States government, or any of its agencies, under any contract or agreement between the government, or any of its agencies, and any person or organization.

Also, we won't cover medical expenses that result from:
• the hazardous properties of nuclear material; or
• the operation of a nuclear facility by any person or organization.

In addition, we won't cover bodily injury or property damage that results from the hazardous properties of nuclear material when:
• the nuclear material is located at, or at any time discharges or disperses from a nuclear facility which is or was at any time owned by any protected person, or operated by or for any protected person;
• the nuclear material is contained in spent nuclear fuel or nuclear waste which is or was at any time possessed, handled, used, processed, stored, transported, or disposed of by or for any protected person; or
• the bodily injury or property damage results from the furnishing by any protected person of services, materials, parts, or equipment in connection with the planning, construction maintenance, operation, or use of a nuclear facility. However, we'll apply this exclusion part only to property damage to the nuclear facility, and any property located on the site of that facility, if the nuclear facility is in the United States of America, its territories or possessions, Puerto Rico, or Canada.
Nuclear energy liability insurance policy means any nuclear energy liability insurance policy issued by any

of the following organizations or their successors:
- Nuclear Energy Liability Insurance Association:
- Mutual Atomic Energy Liability Underwriters.
- Nuclear Insurance Association of Canada

Property damage includes all forms of radioactive contamination of property.

Hazardous properties includes radioactive, toxic, or explosive properties

Nuclear material means any of the following materials which are defined in the federal Atomic Energy Act, or any of its amendments:
- Source material.
- Special nuclear material.
- By-product material

Nuclear facility means any:
- nuclear reactor;
- uranium isotopes separation device or equipment;
- special nuclear material device or equipment; or
- nuclear waste site. Nuclear facility includes:
- the site on which it's located;
- all operations conducted on such site; and
- all premises used for such operations.

Nuclear reactor means any device, equipment, or machine designed or used to:
- sustain nuclear fission in a self-supporting chain reaction; or
- contain a critical mass of fissionable material

Uranium isotopes separation device or equipment means any device or equipment designed or used for:
- separating the isotopes of uranium or plutonium;

- processing or utilizing spent nuclear fuel; or
- handling, processing, or packaging nuclear waste.

Special nuclear material device or equipment means any device or equipment used for the processing, fabricating, or alloying of special nuclear material if the total amount of such material:
- is at any time in the custody of any protected person at the premises where the device or equipment is located; and
- is more than 25 grams of plutonium or uranium 233, or any combination of those two materials; or
- is more than 250 grams of uranium 235.

Nuclear waste site means any structure, basin, excavation, premises, or place prepared or used for the storage or disposal of nuclear waste.

Nuclear waste means any waste material that:
- contains byproduct material; and
- results from the operation of any nuclear reactor, or uranium isotopes separation device or equipment, by any person or organization.

But we won't consider nuclear waste to include tailings or wastes that result from the extraction or concentration of uranium or thorium from any are processed primarily far its source material content.

Spent nuclear fuel means any solid or liquid fuel element or component that's been exposed to radiation or used in a nuclear reactor.
Pollution injury or damage. We won't cover injury or damage or medical expenses that result from pollution at, on, in, or from any:

- protected person's premises;
- waste site; or
- protected person's work site.

Nor will we cover injury or, damage or medical expenses that result from pollution involving any waste pollutant.

But we won't apply this' exclusion to injury or damage or medical expenses that result from:
- building heating equipment fumes, smoke, soot or vapors;
- hostile fire heat, fumes, or smoke; or
- mobile equipment operating fluids.

Nor will we apply this exclusion to:
- bodily injury or property damage that results from your products or completed work, other than waste products or completed work; or
- premises damage that results from fire.

Pollution means any actual, alleged, or threatened discharge, dispersal, escape, migration, release, or seepage of any pollutant.

Pollutant means any, solid,, liquid, gaseous, or thermal irritant or, contaminant, including:
- smoke, vapors, soot, fumes;
- acids, alkalis, chemicals; and
- waste.

Waste includes materials to be recycled, reconditioned, or reclaimed.

Protect 1 persons premises means any premises, site,

by location which is or was at any time owned, rented, leased, borrowed, or occupied by any protected person. For example:

You sold an office building two years ago. It contains asbestos ceiling tile which released asbestos into the air while you owned it. A former tenant now sues you for bodily injury that allegedly resulted from the release of that asbestos. We won't cover such injury.

Another example:

You own an apartment building. Its woodwork is finished with paint that contains lead. Two of your renters sue you for bodily injury to their children allegedly caused by the lead in that paint. The children supposedly consumed the lead by eating chips of the paint from the window sills in their apartments. We won't cover such injury.

But we won't consider a premises, site, or location that isn't owned, rented, leased, borrowed, or occupied by you to be a protected person's premises in connection with pollution that results from your work being performed there.

Waste site mean any premises, site, or location which is or was at any time used by or for any protected person or others, for the handling, storage, disposal, processing, or treatment of, waste. For example:
For several years waste generated by your manufacturing business was disposed of in a landfill owned by others. The landfill was closed two years ago. Nearby residents now allege that they're being injured by the waste from there. We won't cover such injury.

Protected person's work site means any premises, site, or location at, on, or in which work., is being performed by or for any protected person when:
• the pollution involves, a pollutant that is brought to, on, or in such premises, site, or location by or for the protected person in connection with such work; or
• the work being performed is pollution work.

For example:

A subcontractor working for you brings a diesel fuel storage tank to the building site for refueling of its excavation equipment. After a couple of days it is discovered that the tank has been leaking. Some of the escaped fuel is found to have seeped into an underground conduit and damaged the insulation on the fiber optic cables in the conduit. We won't t cover such property damage.

Waste pollutant means any pollutant which is or was at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:
• any protected person; or
• any person or organization for whom you may be legally responsible.

For example:

Waste generated by your business is transported to a landfill by a trucker hired by you. There is an accident which causes the waste to be spilled onto the road. One of the firefighters who responds to the accident later alleges that fumes from the waste made her ill. We won't cover such injury.

Building heating equipment fumes, smoke, soot, or vapors means only the fumes, smoke, soot, or vapors that:
• result from equipment used to heat a building at or on a protected person's premises; and
• are within that building.

Hostile fire heat, fumes, or smoke means only the heat, fumes, or smoke that result from a hostile fire at, on, in, or from:
• the protected person's premises, other than a waste site; or
• the protected person's work site, other than a waste site, but only if the hostile fire doesn't result from pollution work being performed by or for the protected person.

Hostile fire means a fire which:
• becomes uncontrollable; or
• breaks out from where it was intended to be.

Mobile equipment operating fluids means only the fuels, lubricants, or other operating fluids that:
• are part of the mobile equipment being maintained, operated, or used in connection with work, other than pollution work, being performed by or for the protected person at, on, or in the protected person's work site;
• are needed to perform the normal electrical, hydraulic, or mechanical function necessary for the operation of the mobile equipment or any of its parts;
• aren't intended to be discharged, dispersed; or released as part of the operation of the mobile equipment or any of its parts;
• aren't intended to be discharged, dispersed, or released as part of the work being performed by or for the protected person; and

• escape from a mobile equipment part designed to hold, store, or receive them.

Waste products or completed work means your, products or completed work that:
• is or was handled, stored, disposed of, processed, pretreated as waste at, on, or in a waste site; or
• is or was a waste pollutant.

We explain what we mean by:
• mobile equipment in the Mobile equipment exclusion;
• pollution work in the Pollution work, loss, cost, or expense exclusion;
• premises damage in the Each event limit section; and
• your products, your work, and your completed work in the Products and completed work total limit section.

Pollution work loss, cost, or expense: we won't cover any loss, cost, or expense that results from:
• any request, demand, or order that any protected person or others perform pollution work; or
• any claim or suit by or for any governmental authority for damages that result from the performance of pollution work.

Pollution work means:
• the testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, or neutralizing of any pollutant; or
• the responding to, or assessing, in any way the effects of any pollutant.

For example:

A chemical spill at your manufacturing facility releases

a vapor cloud. Several hundred people are exposed to the vapor cloud before it disappears. None of them sustain any apparent bodily injury. However, several of them demand that you arrange and pay for medical checkups now, and yearly for the next ten years to assess the effect of the vapor cloud on their health. We won't cover the cost of such pollution work, regardless of who orders or performs it.

Another example:

One of your products is a container which may be used to store various types of liquids. Several of those containers are sold to a company which uses them for storage of a chemical. During such use one of them ruptures. The spilled chemical must be cleaned up. As a result, the Company demands that you pay for the cleanup. We won't cover the cost of such pollution work, regardless of who orders or performs it.
We explain what we mean by pollutant in the Pollution injury or damage exclusion. Nor quality or performance. we won't cover advertising injury that results from the failure of your products, work, or completed Work to conform with advertised quality or performance.
We explain what we mean by your products, your work, and your completed Work in the Products and completed Work total limit section.

Product recall. We won't cover any loss, cost or expense that:
- is incurred by you or others; and
- results from the recall, removal, or withdrawal of impaired property, or your products or completed work, from the market; or from use by any person or

organization, for any reason.

Nor will we cover any loss, cost ,or expense that is incurred by you or others and results from the:
• loss of use;
• adjustment, inspection, repair;
• replacement; or
• disposal;
of such property, products, or completed work.

We explain what we mean by:
•Impaired property in the Impaired property exclusion; and
• your products and your completed work in the Products and completed work total limit section.

Unnamed partnership, joint venture, or limited liability company. We won't cover injury or damage or medical expenses that result from the conduct of any current or past partnership, joint venture, or limited liability company which isn't shown in the Introduction as a named insured.

Watercraft. We won't cover bodily injury, property damage, or medical expenses that result from the:
• ownership, maintenance, use, or operation;
• loading or unloading; or
• entrustment to others; of any watercraft owned, operated, rented, leased, or borrowed by any protected person.

But we won't apply this exclusion to:
• bodily, injury or property damage for which the protected person has assumed liability under a covered contract for the ownership, maintenance, or use of a

watercraft; or
• premises damage.

Nor will we apply this exclusion to bodily injury, property damage, or medical expenses that result from:
• watercraft while ashore on premises that you own, or rent or lease from others;
• watercraft you don't own that is less than 75 feet long and isn't being used to carry persons or property for a charge; or the operation of specialized equipment.

We explain what we mean by:
• covered contract in the Contract liability exclusion;
• entrustment to others, and loading or unloading, in the Auto exclusion;
• premises damage in the each event limit section; and
• specialized equipment in the Mobile equipment exclusion.

Workers compensation and other benefits laws. We won't cover any obligation that the protected person has under any:
• workers compensation;
• disability benefits;
• unemployment compensation; or
• similar law.

Wrong price description. We won't cover advertising injury that results from the wrong description of the price of your products, work, or completed work.

We explain what we mean by your products, your work, and your completed work in the Products and completed work total limit section.

Other Insurance
This agreement is primary insurance. If there is any other valid and collectible insurance for injury or carnage covered by this agreement, the following applies in connection with that other Insurance:

Other primary insurance. When there is other primary insurance we'll share with that insurance the amounts you're legally required to pay as damages for injury or damage covered by this agreement. We'll do so with one of the methods of sharing described in the Methods of sharing section.

However, we'll apply this agreement as excess insurance over the part or, parts of any other insurance which provide:
• property or similar coverage for property damage to your work;
• property or similar coverage for property damage to premises that you rent, lease, or borrow from others;
• aircraft, auto, or watercraft bodily injury or property damage coverage; or
• protection for you as an additional insured or additional protected person if you agree that we may apply this agreement as excess insurance.
We explain how we'll apply this agreement as excess insurance in the Excess insurance section.

Aircraft, auto, or watercraft bodily injury or property damage coverage means coverage for bodily injury or property damage that:
• results from the maintenance, use,
• operation, or leading or unloading of any aircraft, auto, or watercraft; and
• isn't, specifically excluded by the Aircraft, Auto, or

Watercraft exclusions in this agreement.

We explain what we mean by your work in the Products and completed work total limit section.

Excess insurance. When this agreement is excess insurance, we won't have a duty to defend the protected person against the part or parts of any claim or suit for which any other insurer has the duty to defend the protected person.

However, we'll defend the protected person against a claim or suit for injury or damage covered by this agreement if no other insurer will do so. In return we'll require that we be given all of the protected person's rights against each such insurer.

Also, we'll pay only the amount of damages that is in excess of:
• the total amount that all such other insurance would pay if this agreement didn't exist; and
• the total of all deductible and self-insured amounts under all the other insurance. However, we'll share such excess damages with any other insurance that:

• isn't described in the Other primary insurance section; and
• wasn't bought specifically to apply in excess of the limits of coverage shown in the Coverage Summary.

But we won't pay more than the limits of coverage that apply under this agreement.

Methods of sharing. We'll use one of the methods of sharing described below.

Contribution by equal shares. If all of the other insurance permits contribution by equal shares, we'll share the damages equally. But we won't pay more than the limits of coverage that apply under this agreement. If any policy reaches its limit before the entire amount of damages is paid, the remaining policies will share the balance equally until their limits have been used, up or the amount of the damages is paid in full. For example:

You are required by a court to pay damages of $1,000,000. Besides this agreement, two other policies apply to the judgment.. The limit of this agreement is $500,000. Policy B has a $100,000 limit and Policy C's limit is $300,000.

First, $100,000 is subtracted from each policy's limit because that is, the lowest limit provided by any of the three policies. The result: Policy B's limit is used up; the balance due on the judgment is $700,000; $400,000 remains of this agreement's limit; and the unused portion of Policy C's limit equals $200,000.

Next, $200,000 is subtracted from the limit on this agreement and Policy C because that amount of limit remaining on either policy after the initial $100,000 payment. The result: Policy C's limit is used up, the balance due on the judgment is now $300,000; and this agreement has $200,000 of its limit remaining,

Finally, the rest of the limit on this agreement is paid. The result: this agreement's limit is used up: the balance due on the judgment is now. $100,000, which you must pay; and the total paid under each policy is: $500,000 this agreement, $100,000 Policy B and $300,000

Policy C.

Contribution by limits. If any of the other insurance doesn't permit contribution by equal shares, we'll pay that portion of the damages which is equal to our percentage of the total of all limits that apply. But we won't pay more than the limits of coverage that apply under this agreement. For example:

You are required by a court to pay damages of $600,000. Besides this agreement, another policy applies to the judgment. The limit of this agreement is $300,000 and Policy B has a $100,000 limit. The total limit of all insurance is $400,000.

Our limit is 75% ($300,000/$400,000) of the total limit. But we won't pay 75% of the judgment because that $450,000 share is more than our limit. we'll pay only our limit, which is $300,000.